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89-645

No.

In the Supreme Court of the United States

OCTOBER TERM, 1989

MICHAEL MILKOVICH, SR.
Petitioner,

vs.

THE LORAIN JOURNAL CO.,
THE NEWS HERALD,
and J. THEODORE DIADIUN
Respondents.

PETITION FOR WRIT OF CERTIORARI
Ohio Court of Appeals for the Eleventh Appellate District
(Lake County, Ohio)

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QUESTION PRESENTED

1. Whether statements in a newspaper article directly accusing Petitioner of lying under oath are assertions of fact subjecting the publishers thereof to potential liability for defamation or whether they are expressions of opinion immunized by the First Amendment to the United States Constitution?

PARTIES TO THE PROCEEDINGS

Petitioner is Michael Milkovich, Sr. the former Maple Heights, Ohio varsity high school wrestling coach.

Respondents are J. Theodore Diadiun, a former newspaper reporter for and now executive editor of The News-Herald, a newspaper of general circulation in Northeast Ohio, The News-Herald itself and The Lorain Journal Co., the owner of The News-Herald.

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To the Supreme Court of the United States

OPINIONS BELOW

The journal entry and opinion of the Court of Common Pleas, Lake County, Ohio, granting the motion of defendants ("Respondents") for a directed verdict at the close of plaintiff's ("Petitioner's") case, is unreported and is set forth in the appendix at p. A21. The judgment entry and opinion of the Court of Appeals

of Ohio, Eleventh District, County of Lake, reversing the determination of the Court of Common Pleas, are set forth in the appendix at p. A23; this opinion is reported at 65 Ohio App. 2d 143, 416 N.E.2d 662 (Lake Co. 1979). The orders of the Supreme Court of Ohio dismissing defendants' appeal, overruling a motion for certification and denying rehearing with respect thereto are unreported and are set forth in the appendix at pp. A38, A39, A40.

The denial of Respondents' first petition for writ of certiorari from this Court is set forth in the appendix at p. A2 and was reported at 449 U.S. 966 (1980).

The second journal entry and opinion of the Court of Common Pleas, Lake County, Ohio, granting Defendants' second summary judgment motion are unreported and are set forth in the appendix at p. A54. The

second judgment entry and opinion of the Court of Appeals of Ohio, Eleventh District, County of Lake, affirming the determinations of the Court of Common Pleas, are unreported and are set forth in the appendix at pp. A56; A65. The judgment entry of the Supreme Court of Ohio and the opinion of that Court, reversing and remanding the decision of the Court of Appeals is set forth in the Appendix at p. A67, and are also reported at 15 Ohio St. 3d 292, 473 N.E.2d 1191 (1984).

The third journal entry and opinion of the Court of Common Pleas, Lake County, Ohio granting Defendants' renewed motion for summary judgment are unreported and are set forth in the appendix at p. A92. The third journal entry and opinion of the Court of Appeals of Ohio, Eleventh District, County of Lake, affirming the determination of the Court of Common

Pleas, are unreported and are set forth in the appendix at p. A93. The journal entry of the Supreme Court of Ohio refusing Petitioner's appeal is unreported and is set forth in the appendix at p. A1.

JURISDICTION

1. On June 7, 1989, the Supreme Court of Ohio overruled Petitioner's motion for an order directing the Court of Appeals for Lake County, Ohio to certify its record and denied Petitioner's appeal as of right. This constitutes the final order of the Supreme Court of Ohio with respect to this case.

2. Jurisdiction to hear this writ of certiorari is conferred on this Court by 28 U.S.C.A. Section 1257(3) (1988).

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides, in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

The Fourteenth Amendment to the United States Constitution provides, in part:

> "No State shall . . . deprive any person of life, liberty or property, without due process of law."

STATEMENT OF THE CASE

A. The Facts

1. This is an extraordinary libel case. It arises from an article written by J. Theodore Diadiun and published by The News-Herald, a newspaper in Lake County, Ohio owned by the Lorain Journal Company, all Respondents herein. Petitioner is Michael Milkovich, Sr., the former varsity wrestling coach of the Maple Heights, Ohio high school wrestling team. On January 8, 1975, Respondents

published an article[1] accusing Petitioner of lying under oath in a judicial proceeding and otherwise lying in a probe of an altercation at a wrestling match.

2. The judicial proceeding at which Petitioner was accused of committing the crime of perjury was initiated by several student wrestlers on the Maple Heights, Ohio varsity wrestling team. They alleged that a decision of the Ohio High School Athletic Association (OHSAA), an organization that governs high school athletics in Ohio, disqualifying them from participating in the 1975 Ohio State Wrestling Tournament violated their rights to due process of law. The Maple Heights team had been disqualified from that tournament by OHSAA due to a fracas that

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[1]The article is reproduced in full in pages A139 - A141 of the Appendix.

occurred at an interscholastic meet on February 9, 1974 between the Maple Heights and the Mentor, Ohio teams. Petitioner, as coach of the Maple Heights team, was put on "probation" for two years by OHSAA.

3. Respondent Diadiun was at the wrestling match as a reporter. Mentor, Ohio is a community in Lake County, Ohio, the primary market for The News-Herald. Mr. Diadiun testified before the OHSAA, claiming that the Petitioner caused and orchestrated the fracas.

4. The judge to whom the due process case was assigned held a hearing on November 8, 1974 on a motion for a temporary restraining order. Petitioner was not a party in that case but he was called to testify as was H. Don Scott, the Superintendent of the Maple Heights School District. Neither Diadiun nor anyone else from The News Herald was present at the hearing.

5. Dr. Harold Meyer, Commissioner of the OHSAA, was present for a part of the hearing but left **before** Milkovich or Scott testified.

6. On January 7, 1975, the Court of Common Pleas of Franklin County, Ohio granted the motion for a temporary restraining order and OHSAA was enjoined from carrying out its sanctions.

7. The next day, an article written by Diadiun appeared on pages 35 and 39 of The News Herald entitled "**Maple Beats the Law with the 'Big Lie'**.[2] Diadiun alleged in the article that Messrs. Milkovich and Scott had "lied to get themselves out of a jam" and had "lied at the [court] hearing after having given the solemn oath to tell the truth." Diadiun attributed to Dr.

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[2]The article was headlined on page 39 as "**. . . Diadiun says Maple Told a Lie.**"

Meyer a statement that Milkovich's and Scott's testimony had varied from the OHSAA hearing. However, Dr. Meyer has denied even speaking with Diadiun before the article was written and denies saying anything about Milkovich or Scott's testimony at the due process hearing because he was not present when they testified. [Deposition of Dr. Meyer included in the Record].

THE PROCEEDINGS

1. On April 30, 1975, Milkovich filed suit in the Court of Common Pleas of Lake County, Ohio against The News-Herald and The Lorain Journal Company. The complaint was later amended to name Diadiun as a defendant. The action was tried to a jury. After five days of trial, Respondents' motion for a directed verdict was granted on the grounds that Milkovich was a public figure and that there was

insufficient evidence of actual malice to warrant sending the case to the jury.

2. Milkovich appealed to the Ohio Court of Appeals for the Eleventh District, Lake County, Ohio, on December 3, 1979. That Court reversed and remanded the case, Milkovich v. Lorain Journal Co., 65 Ohio App. 2d 143 (1979).

3. Respondents appealed to the Supreme Court of Ohio. On March 20, 1980, Ohio's highest court dismissed the appeal on the basis that no substantial constitutional question existed. This Court subsequently denied Respondents' petition for a writ of certiorari. Lorain Journal Co. v. Milkovich, 449 U.S. 966 (1980).

4. On remand to the Court of Common Pleas of Lake County, Ohio, Respondents moved for summary judgment contending for the first time that Diadiun's defamatory statements were constitutionally protected as "opinions." The trial court granted

summary judgment. Milkovich appealed to the same Court of Appeals, which affirmed the decision on October 3, 1983. Milkovich then appealed to the Supreme Court of Ohio which, on December 31, 1984, reversed the Court of Appeals. The Supreme Court of Ohio held that Milkovich was not a public figure or a public official and that Respondents were not immune from liability because Diadiun's statements were not "opinion." Milkovich v. Lorain Journal Co., 15 Ohio St. 3d 292 (1984). Respondents again petitioned for certiorari but the writ was denied. 474 U.S. 953 (1985).

5. On remand, the trial court stayed proceedings while the Supreme Court of Ohio considered the companion case of H. Don Scott v. The News Herald, 25 Ohio St. 3d 243 (1986). The Scott case arose out of the same defamatory article. On August 6, 1986, a bare majority of the Supreme

Court of Ohio held, 4-3, that the same statements which had been found to be factual assertions in Milkovich v. Lorain Journal Co. were now "opinions" rather than "facts." Respondents were thus immunized from liability to Mr. Scott.

6. The Court of Common Pleas of Lake County, Ohio thereupon granted Respondents' renewed motion for summary judgment holding that notwithstanding the law of the case doctrine, it was bound by the remarkable decision in Scott. The Court of Appeals for the Eleventh District, Lake County, Ohio affirmed the trial court's decision on February 6, 1989. Petitioner again appealed to the Supreme Court of Ohio on March 1, 1989. On June 7, 1989, the Supreme Court of Ohio declined to review the decision of the Court of Appeals on the stated ground that no substantial constitutional issue was presented.

7. Milkovich now petitions this Court for a writ of certiorari so that the crucial issue of how defamatory statements should be characterized can be definitively decided.

REASONS FOR GRANTING PETITIONER'S WRIT

THE SUPREME COURT OF OHIO ERRONEOUSLY DETERMINED THAT RESPONDENTS WERE IMMUNE FROM LIABILITY FOR PUBLISHING DEFAMATORY FALSEHOODS ABOUT THE PETITIONER BECAUSE THE STATEMENTS WERE ALLEGEDLY "OPINIONS" RATHER THAN "ASSERTIONS OF FACT."

This case squarely raises a recurring and pivotal issue in the law of defamation: How should defamatory statements be analyzed to determine whether they are assertions of fact or expressions of opinion? This issue is especially important in this case as the highest court in Ohio has now reached an opposite

conclusion interpreting the same statements in the course of just two years. Cf. Milkovich v. Lorain Journal Co., 15 Ohio St. 3d 292 (1984) with Scott v. News Herald, 25 Ohio St. 3d 243 (1986).

This case presents an exceptional opportunity for this Court to clarify how the opinion/fact distinction should be made. The importance of clarity in ". . . the area of free speech [is particularly important] for precisely the same reason that the actual malice standard is necessary. Uncertainly as to the scope of the constitutional protection can only dissuade protected speech - the more elusive the standard, the less protection it affords." Harte-Hanks Communications, Inc. v. Connaughton, ___ U.S. ___, 109 S. Ct. 2678 (1989).

The opinion/fact distinction goes to the heart of the tension in modern defamation law between a state's interest

in protecting and redressing reputational injury and First Amendment concerns. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 788-791 (1986). The distinction may have been elevated to constitutional dimensions by dicta in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), where this Court said:

> **We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interests in 'uninhibited, robust, and wide-open debate' on public issues.** (emphasis supplied).

Id. at 339-340. Since Gertz, substantial controversy has arisen in many defamation cases as to whether particular statements are false statements of fact or whether they are opinions. Indeed it is not uncommon for a defamation defendant to

argue that even the most obvious statement of fact is just an opinion and, without reasoned analysis by the judiciary, defendants have been immunized from liability without any conceivable justification. If the opinion/fact distinction is not properly made, there is a very real danger that ". . . private citizens [will be stripped] of all means of redress for injuries inflicted upon them by careless liars." Rosenblatt v. Baer, 383 U.S. 75, 92-94 (1966). This is what occurred in the case at bar.

The distinction between false statements of fact and expressions of opinion has frequently been crudely made. Chief Justice Rehnquist has observed that

> [l]ower courts have seized on the word 'opinion' [in Gertz v. Robert Welch, Inc.] to solve with a meat axe a very subtle and difficult question, totally 'oblivious of the rich and complex history of the struggle of the common law to deal with this problem.' Hill, Defamation and Privacy Under the First Amendment, 76 Colum. L. Rev. 1205, 1239 (1986).

Ollman v. Evans, 471 U.S. 1127, 1129 (1985) (dissenting from denial of petition for writ of certiorari). In the case at bar the Supreme Court of Ohio used a meat axe disguised as a "totality of the circumstances test" to reach a palpably erroneous conclusion that statements of fact were protected opinions. To borrow Judge Friendly's comment from Cianci v. New Times Publishing Co., 639 F.2d 54 (2d Cir. 1980), the Supreme Court of Ohio "indulge[d] in Humpty Dumpty's use of language" to reach the conclusion it did. Id. at 64.

This Court has not yet had the opportunity squarely to address the opinion/fact distinction in libel law. However, several cases suggest that a contextual analysis is appropriate. In Greenbelt Cooperative Publishing Assn., Inc. v. Bresler, 398 U.S. 6 (1970), characterizing a land developer's negoti-

ating position as "blackmail" was held to be not defamatory because ". . . even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet by those who considered [the developer's] position extremely unreasonable." Id. at 14.

Similarly, in Old Dominion Branch No. 496 National Assn. of Letter Carriers vs. Austin, 418 U.S. 264 (1974), a vituperative definition of a "scab" in a labor newsletter was held not violative of the National Labor Relations Act because the ". . . words were obviously used . . . in a loose, figurative sense . . ." Id. at 284. Context appears to be the guiding light in these cases combined with an objective assessment of the statement itself.

Indeed this is the approach generally followed by other courts. In Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976),

cert. denied, 429 U.S. 1062 (1972), the court analyzed two statements using objective criteria and contextual analysis: An allegation that William F. Buckley, Jr. was a "fellow fascist traveler" and an allegation that he had lied about and libeled other persons. The Court determined that the description of Mr. Buckley as a "fellow fascist traveler" was rhetorical, that the words used had a "loose" and "varying" meaning and were not susceptible ". . . to proof of truth or falsity." Id. at 894. Thus, that statement was held not actionable. However, the allegations that Mr. Buckley had lied about and libeled others were held actionable because those assertions were definite and suspectible to proof of truth or falsity. Id. at 895-896.[3]

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[3]In Hotchner v. Castillo-Puche, 551
(Footnote Continued)

The Second Circuit in Cianci v. New Times Publishing Co., 630 F.2d 54 (2d Cir. 1980) held that an allegation ". . . which could be reasonably understood as imputing specific criminal or other wrongful acts . . ." is not privileged as "opinion" since such allegations are not " . . . undefined slogans that are part of the conventional give and take in our economic and political controversies." Id. at 64, quoting Cafeteria Union v. Angelos, 320 U.S. 293, 295 (1943). Judge Friendly averred that calling charges of criminal

(Footnote Continued)
F.2d 910 (6th Cir. 1977), the Sixth Circuit flatly held that "[a]n assertion that cannot be proved false cannot be held libelous. A writer cannot be sued for simply expressing his opinion of another person, however unreasonable the opinion or vituperous the expression of it may be." Id. at 93. [The plaintiff complained of being termed a "manipulator," a "toady," a "two-faced hypocrite" and an "exploiter" among other things. Id. at 912.]

conduct " . . . merely an expression of 'opinion' would be to indulge in Humpty Dumpty's use of language. We see not the slightest indication that the Supreme Court or this court ever intended anything of the sort and much to demonstrate the contrary." Cianci, supra, at 64.4

The Court of Appeals for the District of Columbia Circuit comprehensively considered the issue in Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc), cert. denied, 471 U.S. 1127, 105 S.Ct. 2662 (1985). Recognizing that making the

[4]Other courts have adopted formulations to examine "all" or "many" factors. Cf. Information Control Corp. v. Genesis One Computer Corp., 611 F. 2d 781 (9th Cir. 1980); Lewis v. Time, Inc., 720 F.2d 549 (9th Cir. 1983); Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984); McCabe v. Rattiner, 814 F.2d 839 (1st Cir. 1987); Potomac Valve & Fitting, Inc. v. Crawford Fitting Co., 829 F.2d 1280 (4th Cir. 1987); Janklony v. Newsweek, 788 F.2d 1300 (8th Cir.) cert. denied, 479 U.S. 883, 107 S.Ct. 272 (1986).

opinion/fact distinction was a "delicate and sensitive task of accommodating the First Amendment's protection of free expression of ideas with the common law's protection of an individual's interest in reputation," Id. at 974, four factors were identified to help ". . . in assess[ing] whether the average reader would view [a defamatory] statement as fact or, conversely, opinion. While necessarily imperfect, these factors will . . . assist in discerning as systematically as possible what constitutes an assertion of fact and what is . . . an expression of opinion." Ibid.

The Ollman factors are as follows: (1) What is the common usage or meaning of the specific language used? If the language used has a precise and understood meaning readers are more likely to conclude that the statement is factual; (2) Is the statement capable of being

objectively verified? If not, a reader is less likely to believe that it has specific factual content; (3) What is the "full content" of the statement? The unchallenged language around the defamation may influence a reader's "readiness to infer that a particular statement has factual content"; (4) What is the broader context or setting in which the statement appears? This factor applies because "[d]ifferent types of writing have . . . widely varying social conventions which signal the reader of the likelihood of a statement[] being fact or opinion." Id. at 979.

One of the defamatory statements analyzed in Ollman was an assertion by two syndicated columnists that the plaintiff, a professor at New York University, "ha[d] no status within his profession, but [was] a pure and simple activist." The plaintiff had just been appointed chairman

of the Department of Government and Political Science at the University of Maryland. A "confluence of factors" lead the court, en banc, to the conclusion that the quoted statement was not actionable: (1) The fact that the statement was made on the Op-ed page of the Washington Post which led the court to assume that the "average reader will be influenced by the general understanding of the function of those columns." Id at 990; (2) The "thrust" of the article which was to question the plaintiff's scholarship rather than to allege that he is not a scholar or that his colleagues did not regard him as one; Id. at 990; and (3) The fact that the statement was made only after identifying Ollman as a professor at New York University. Ibid. The Court made clear its view that characterizing the statements as "fact" or "opinion" was not "a Talmudic parsing of a single

sentence of two" but, instead, was a "practical one" which, in view of the First Amendment, "counsels strongly against straining to squeeze factual content from a single sentence in a column that is otherwise clearly opinion." Id. at 991.

Whether one agrees with the ultimate result in Ollman or not, its analytical framework and reasoning process is meaningful and strikes a balance between the competing interests at stake. Unfortunately, the same cannot be said of the Supreme Court of Ohio's approach in the case at bar.

The decision sub judice is entirely premised on the decision in H. Don Scott v. The News Herald, 25 Ohio St. 3d 243 (1986) wherein the Supreme Court of Ohio, analyzing the same language here in issue, transmuted outright assertions of fact into expressions of opinion. The Supreme

Court of Ohio used a seemingly innocuous "totality of the circumstances" test where "at least" four factors were to be considered "as a compass . . . and not a map to set rigid boundaries." Scott v. News Herald, 25 Ohio St. 3d 243, 250 (1986).[5] While the Ohio court's four factors are similar in description to those developed in Ollman v. Evans, supra, that is where the similarity stops. Instead of applying the factors meaningfully to determine what a reasonable reader would most probably think about the statements here in issue, the Scott court essentially ignored the objective factors showing that the

[5]The four factors are: (1) the specific language used; (2) whether the statement is verifiable; (3) the general context of the statement and (4) the "broader context" in which the statement appeared. 25 Ohio St. 3d 243, 250 (1986).

statements were unequivocally factual assertions and misapplied the subjective factors to reach an untenable result. The tortured logic and complete disregard of the language used by the Respondents has had the practical effect of leaving Petitioner without redress for his reputational injury and has given complete immunity to the Respondents for quint-essential false statements of fact. Such immunity does not in the slightest advance society's interest in "uninhibited, robust, and wide-open debate" on public issues, the raison d'etre' for judicial protection in this context. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

There are five distinctive defama-tory assertions of fact in Respondents' article. They are as follows:

A.

. . . When a person takes on a job in a school, whether it be as a teacher, coach, administrator or even maintenance worker, it is well to remember that his primary job is that of educator . . . [m]any are the lessons taken away from school by students which weren't learned from a lesson plan or out of a book. the come from personal experiences with and observations of their superiors and peers, from watching actions and reactions. Such a lesson was learned (or relearned yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8. A lesson which, in view of the events of the past year, is well they learned early. It is simply this: If you get in a jam, lie your way out. If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened. The teachers responsible were mainly high school wrestling coach Mike Milkovich and former superintendent of schools H. Donald Scott . . .

* * * * *

B.

[W]hen Mentor protested to the governing body of high school sports [about Milkovich's alleged misconduct during a high school wrestling match], the two men [Milkovich and Don Scott, the Maple Heights School Superintendent] were called on the carpet to

account for the incident. But they declined to walk into the hearing and face up to their responsibilities . . . Instead they chose to come to the hearing and misrepresent the things that happened . . . Fortunately, . . . the Milkovich-Scott version had enough contradictions and obvious untruths so that the six board members were able to see through it. Probably as much in distasteful reaction to the chicanery of the two officials . . . the board . . . suspend[ed] Maple from this year's tournament and put . . . Milkovich . . . on probation. But unfortunately, by the time the hearing before Judge Martin rolled around, Milkovich and Scott apparently had their version of the incident polished and reconstructed . . . [T]he judge bought their story.

* * * * *

C.

Anyone who attended the meet . . . knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth. But they got away with it. Is this the kind of lesson we want our young people learning from their high school administrators and coaches? I think not.

* * * * *

D.

"Maple Beat the law with the 'Big lie'"

* * * * *

E.

"Diadiun says Maple told a lie." (Emphasis supplied.)

The essence of these statements is that Mr. Diadiun accused Petitioner of committing the crime of perjury and of lying to OHSAA at its inquiry about what occurred at the wrestling match in issue. The language could not be plainer. Indeed the Supreme Court of Ohio in Scott conceded that the language used was quite unequivocal and further conceded that the truth or falsity of the claims was readily verifiable (two of its four factors). 25 Ohio St. 3d at 250-251. However, the Court veered far off course in its analysis of the "general" and "broader" contexts in which the statements were made.

As to the "general context," the Court considered it important that Diadiun mixed sermonizing about the status of a

teacher in general with his repeated allegations that Milkovich had lied both before the governing body of Ohio high school sports and in a court of law. Diadiun's allegations were thus construed to mean that Milkovich was not accused of perjury but, instead, that it was Diadiun's ". . . view that any position represented by [Petitioner] . . . less than a full admission of culpability was, in his view, a lie." 25 Ohio St. 3d at 310. It is simply not possible to reasonably construe the story's headlines "Maple Beat the Law with the 'Big Lie'" and ". . . Diadiun says Maple told a Lie" together with statements like "[a]nyone who attended the meet . . . knows in his heart that Milkovich . . . lied at the hearing after having given his solemn oath to tell the truth" as merely Diadiun's "view" that any position other than Diadiun's was, in Diadiun's view, "a lie."

Scott, supra at 252. This is, instead, "Humpty-Dumpty's use of language." Cianci v. New Times Publishing Co., 630 F.2d 54, 64 (2d Cir. 1980).

The Scott court likewise misconstrued the headlines in the article as precautioning the reader that the article was "opinion" because of the caption "T.D. Says" and the language "Diadiun says." 25 Ohio St. 3d at 310. When viewed in context however, the only significance of the captions was that they identified the author of the article.

The Scott court went even further to almost rewrite the article in one crucial respect. Mr. Diadiun attributed his information about Petitioner's alleged perjury at the due process hearing to the Commissioner of the OHSAA, Dr. Harold Meyer. However, the Commissioner denied having any discussion with Diadiun about Petitioner's testimony at the hearing and

was not even present when Petitioner testified. Calling this a "troubling addition" to the article, the majority nonetheless overlooked it by saying that Diadiun's article " . . . was really based upon the two events he witnessed." Id. at 253. To reach this conclusion, one must totally ignore Diadiun's unequivocal contention that Michael Milkovich lied under oath at a hearing at which Diadiun was not even present. The Scott court calls Diadiun's presumed premise an "implicit caveat" which is a "factor to be considered." The fact of the matter is that a reasonable reader could come to but one conclusion upon reading the article: That Diadiun had talked to Dr. Meyer and may have been present at the judicial hearing and knew first hand that Petitioner's testimony was perjured. This is a paradigm example of a defamatory

assertion of fact which certainly should be actionable if false.

The Scott court took even greater liberties with the "broader context" of the article. At least in Ollman v. Evans, supra, the statements in issue were printed on the opinion page. In Scott, however, the court found it important that the article was published on the sports page which it called a "traditional haven for cajoling, invective, and hyperbole." Id. at 253. Thus, the Court reasoned that a reasonable reader would "probably construe" the "legal conclusions" set out in the article as the writer's opinion. Id. at 254.

While context is undoubtedly essential to understanding how a reasonable person may construe a particular statement, the Scott decision uses it as a sham to insulate otherwise obviously factual assertions from exposure

to defamation claims. If the sports page is a "haven for hyperbole," one can imagine arguments that any part of a newspaper is likewise such a haven. It is not an unwarranted leap to think that any number of such pernicious devices will be used by publishers to escape liability, while the sting of reputational injury is not diminished at all.6

The Scott court's analysis yields the conclusion that no framework at all would be just as good, if not better, than subjective analysis yielding results

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6For example, particularly damning statements could be preceded by "I think", or "it is my opinion" or similar gloss. Further it must be noted that in this case, Petitioner was a successful wrestling coach, well-known in his field. Having an article like the one here in issue written on the sports page was particularly devastating to him as it spoke directly to his constituency - persons interested in the sport of wrestling.

totally at odds with reason, common sense, and rational interpretation. As Judge Bork said in his concurring opinion in Ollman, the "'opinion-fact' dichotomy is not as rigid as [some] suppose," Id. at 992, and there is no "mechanistic rule that requires us to employ hard categories of 'opinion' and 'fact.'" Id. at 1001. He contends, rightly so, that "context" is the pivotal issue and how a reader perceives the statement is the primary focus.[7] Id. at 1005. There is but only

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[7]There are certain paradigm examples of opinion and fact. Judge Bork offered that "[the] assertion that 'Jones stole $100.00 from the church poor box last Friday night' can not be tortured into an opinion, just as the assertion that 'I think Jones is the kind of man who would steal from the church's poor box is obviously only a statement of the speaker's opinion of Jones' character." Id. at 1008-1009. Petitioner contends that asserting that he lied under oath is no less a paradigm assertion of fact, both alone and in context, no matter how tortured the analysis is.

one way that readers of Diadiun's defamatory article could reasonably interpret it: Diadiun believed and stated unequivocally that Mike Milkovich committed the crime of perjury and got away with it. If false, and it surely is, the statement is clearly actionable.

The dissenting justices in Scott pointed out the evident problems with the court's analysis of the statements in issue. Former Chief Justice Celebreeze succinctly observed that the totality of the circumstances test was "not only unworkable [but] . . . is applied . . . in [a] self-contradictory fashion to reach an untenable result." Id. at 263. Justice Clifford Brown considered that the

> . . . new 'test' is, in practice, so malleable and spongy as to permit any interpretation anyone wishes. It will enable any judge or reviewing court to label any clearly libelous statement of fact as a statement of opinion and thereby for all practical purposes create absolute immunity for every congenital liar who publicly utters or writes slanderous or libelous

statements. Most likely, given a close reading, the article in question combines assertions of fact with expressions of opinion in the hope that the facts asserted will bolster the impact of the opinions. Nonetheless, that combination should not detract from the majority's specific finding that the language used imparts "the clear impact" that appellant committed the crime of perjury, and that the article reinforces that "impact" with a quotation attributed to a named, apparently reputable source, a fact which the majority characterizes as merely "troubling." Given the lack of clear guidance that the majority's "test" provides, this is an ideal case to apply the doctrine of stare decises.

* * * * *

All of the foregoing is apparent from the majority's vapid, meaningless, so-called four-factor test to determine if a defamatory statement is a statement of fact or opinion. Where this issue exists in any libel trial in future cases involving the press as a defendant, the trial judge might as well simply direct a verdict for the defendant, or even better, routinely grant summary judgment motions made by the defense, because, given the result of the case at bar, it is difficult to imagine what otherwise libelous statements of fact will remain actionable once they have been printed in a newspaper.

* * * * *

The standardless four-factor test for distinguishing fact from opinion, as applied here in Scott, makes every statement of fact a statement of opinion in every case and therefore not actionable. This is a deprivation of every libeled plaintiff's rights under both the Ohio Constitution and the United States Constitution.

* * * * *

If the majority desires to be absolutist (all statements of fact are opinions) with respect to the First Amendment freedom of the press, it should say so, as did the late Justice Hugo Black, instead of foisting upon the public several confusing theories, standards and analyses of legal justification and defense, all of which will obfuscate the law in this area.

Id. at 273; 275-276.

The Supreme Court of Ohio's analysis in the Scott case demonstrates the critical need for this Court's intervention and guidance concerning the opinion defense in defamation cases. This case presents the ideal opportunity to address this pressing issue.

CONCLUSION

Petitioner therefore respectfully requests that this Court grant his petition to consider the important questions presented and to correct a serious injustice which has precluded him from having his defamation case heard on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two true and complete copies of the foregoing Petition for Writ of Certiorari was mailed by regular U.S. Mail, postage prepaid, this 20th day of October, 1989 to Richard D. Panza, Esq., Counsel of Record for the Respondents, Wickens, Herzer & Panza Co., L.P.A., 1144 West Erie Avenue, Lorain, Ohio 44052.

BRENT L. ENGLISH
Attorney for Petitioner

APPENDIX

Decision of the Supreme Court of Ohio
(June 7, 1989)

The Supreme Court of Ohio

1989 TERM

To wit: June 7, 1989

Case No. 89-547

ENTRY

Michael Milkovich, Sr.,
Appellant.

v.

News Herald et al.,
Appellees.

Upon consideration of the motion for an order directing the Court of Appeals for Lake County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $20.00, paid by Brent L. English.
(Court of Appeals No. 13009)

/S/ THOMAS I. MOYER
Chief Justice

Decision of United States Supreme Court on Respondents' First Request for Certiorari
(November 5, 1980)

No. 80-100

THE SUPREME COURT OF THE UNITED STATES

LORAIN JOURNAL CO., *et al.*,
Petitioners,

vs.

MICHAEL MILKOVICH, SR.,
Respondent.

449 U.S. 966

No. 80-100. LORAIN JOURNAL Co. *et al. v.* MILKOVICH. Ct. App. Ohio, Lake County. Motions of Beacon Journal Publishing Co. et al. and Ohio Newspapers Association for leave to file briefs as *amici curiae* granted. Certiorari denied. JUSTICE STEWART would deny this petition for want of a final judgment. Reported below: 65 Ohio App. 2d 143, 416 N. E. 2d 662.

JUSTICE BRENNAN, dissenting.

This petition for certiorari raises an important question concerning limitations on the authority of trial courts to grant dismissals, summary judgments, or judgments notwithstanding the verdict[1] in favor of media defendants

1. Although the decision below concerned directed verdicts, its holding would affect the courts' treatment of summary judgments and judgments notwithstanding the verdict as well. In each of these situations, the court is called upon to answer the same question: whether there is sufficient evidence for the jury to find actual malice under the applicable "clear and convincing evidence" burden of proof.

in libel actions, based on the qualified privilege outlined in *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964).

On January 8, 1975, the News-Herald of Willoughby, Ohio, published a column by sportswriter Ted Diadiun criticizing respondent Michael Milkovich, a wrestling coach at Maple Heights High School, who is treated as a "public figure" for purposes of this case. Headlined "Maple beat the law with the 'big lie'" the column accused Milkovich of lying about a fracas that occurred during one of his team's wrestling matches.

On February 9, 1974, the Maple High wrestling team, coached by Milkovich, faced a team from Mentor High School. A brawl involving both wrestlers and spectators erupted after a controversial ruling by a referee. Several wrestlers were injured. The Ohio High School Athletic Association (OHSAA) subsequently conducted a hearing into the occurrence, censured Milkovich for his conduct at the match, placed his team on probation for the school year, and declared the team ineligible to compete in the state wrestling tournament. Diadiun attended and reported on both the match and the hearing, at which Milkovich had defended his behavior. Thereafter, a group of parents and high school wrestlers filed suit in Franklin County Common Pleas Court, claiming that the OHSAA had denied the team due process. Milkovich, not a party to that lawsuit, appeared as a witness for the plaintiffs. On January 7, 1975, the court held that due process had been denied, and enjoined the team's suspension. *Barrett v. Ohio High School Athletic Assn.*, No. 74CV-09-3390.[2]

2. The court ruled that the wrestling team was denied its right to cross-examine witnesses and to call witnesses on its behalf. The court did not make any factual findings concerning the underlying occurrences, nor did it comment on those occurrences.

Diadiun did not attend the court hearing, review the transcript, or read the court's opinion, but he wrote a column about the decision based on his own recollection of the wrestling match and ensuing OHSAA hearing and on a description of the court proceeding given him by an OHSAA Commissioner. In the column, Diadiun stated that Milkovich and others had "misrepresented" the occurrences at the OHSAA hearing, and that Milkovich's testimony "had enough contradictions and obvious untruths so that the six board members were able to see through it." Diadiun went on to say, however, that at the later court hearing Milkovich and a fellow witness "apparently had their version of the incident polished and reconstructed, and the judge apparently believed them." Diadiun concluded that anyone who had attended the match "knows in his heart that Milkovich . . . lied at the hearing after. . . having given his solemn oath to tell the truth. But [he] got away with it."

Milkovich filed a libel action in state court against petitioners Diadiun, the News-Herald, and the latter's parent corporation. Petitioners moved for summary judgment. The court held that Milkovich is a public figure for purposes of the *New York Times* test,[3] but denied summary judgment. The action was then tried to a jury. After five days of trial, at the close of Milkovich's evidence, petitioners moved for a directed verdict. They argued that Milkovich had failed to proffer sufficient evidence from which the jury could conclude that Diadiun's column had been published with actual malice under the *New York Times* test. The court granted the motion for directed verdict, stating that the evidence, considered most strongly in favor of Milkovich, "fails to establish by clear

3. The ruling that Milkovich is a public figure is unchallenged.

and convincing proof that the article . . . was published with knowledge of its falsity or in reckless disregard of the truth."

Milkovich appealed to the State Court of Appeals, which reversed and remanded for trial. The court stated that Diadiun's column conflicted with the factual determination reached in the earlier Common Pleas Court injunctive action, and held that this conflict alone constituted sufficient evidence of actual malice to withstand petitioner's motion for directed verdict.[4] Petitioners appealed to the Ohio Supreme Court, and also sought review in the nature of certiorari. The Ohio Supreme Court dismissed the appeal as raising "no substantial constitutional question" and otherwise denied review. The court also denied petitioners' motion for rehearing.[5]

---

4. The court stated:

"In the instant case, a court of law, based on the evidence before it, and having the right to determine where the truth lay, even though on a due process question, determined the truth in favor of the plaintiff and the wrestling team he coached. Thus, he had his day in court and was at that time at least, exonerated by the only recognized arbiter of the truth in our American judicial system, but thereafter was still called a liar for the testimony he allegedly gave during that trial. . . . It would appear that, though the press might be at liberty to criticize the judicial process and the results of a given case, unless and until the judgment of the court is overturned on appeal, the determination of what constitutes that truth has been made. Thus, any news article written either as fact as a news item, or as opinion, that is published knowing that it conflicts with a judicial determination of the truth, may, in our opinion, be regarded as a reckless disregard of the truth so as to constitute 'actual malice' so as to be actionable libel of a public person. Whether, in a given case, it constitutes a reckless disregard of the truth, is not, in our opinion, a question of law, but a question of fact based on the evidence before the court." 65 Ohio App. 2d 143, 146, 416 N. E. 2d 662, 666 (1979).

5. Although the appellate court below remanded the case for retrial, including a jury determination on the actual-malice issue, the decision was nonetheless a final judgment for purposes

(Continued on following page)

The import of the Ohio appellate court's holding is plainly that, even in the absence of proof of knowing falsehood or reckless disregard for the truth, a newspaper forfeits its right to a directed verdict, summary judgment, or judgment notwithstanding the verdict on the issue of actual malice if it has published a statement that conflicts, however tangentially, with a decision by a court. This holding is clearly contrary to the First Amendment and to the relevant precedents of this Court. I had supposed it was settled that newspapers are privileged to publish their views of the facts, so long as those views are not recklessly or knowingly false. It matters not that such views may conflict with those of a court, for the press is free to differ with judicial determinations. In the libel area, neither a court nor any other institution is the "recognized arbiter of the truth," as the court below asserted. See *Gertz v. Robert Welch, Inc.*, 418 U. S. 323, 339-340 (1974).[6]

One part of the "strategic protection" that decisions of this Court have extended to the press in the libel area is the insistence that a public figure can prevail "only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth." *Gertz v. Robert Welch, Inc., supra*, at 342; *New York Times Co. v. Sullivan*, 376

Footnote continued—

of 28 U. S. C. § 1257. A decision in favor of petitioners would terminate the litigation, while a failure to decide the question now would leave the press in Ohio "operating in the shadow of . . . a rule of law . . . the constitutionality of which is in serious doubt." *Cox Broadcasting Corp. v. Cohn*, 420 U. S. 469, 488 (1975); *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241, 246-247 (1974).

6. Indeed, at common law, a factual finding embodied in the judgment in another cause could not even be used as evidence of that fact in court. 5 J. Wigmore, Evidence § 1671a, pp. 806-807 (Chadbourn rev. 1974).

U. S., at 285-286. The court in a libel action has a responsibility to ensure that sufficient evidence of actual malice has been introduced to permit a jury finding under this exacting standard. This protection must not be withdrawn merely because the press account may have differed with the conclusions of a court, lest the "uninhibited, robust, and wide-open." *New York Times v. Sullivan*, *supra*, at 270, discussion of judicial proceedings be deterred. See *Richmond Newspapers, Inc. v. Virginia*, 448 U. S. 555 (1980).

The consequence of the erroneous ruling in this case is particularly apparent on the facts: petitioners were denied a directed verdict on the strength of a prior court opinion that did not even discuss, let alone decide, what had happened at the disrupted wrestling match or whether Milkovich had testified truthfully. The court had merely ruled that the Maple High School wrestling team was denied certain procedural safeguards required under due process. Thus, it is abundantly apparent that the state court's conclusion that Diadiun wrote this column "knowing that it conflicts with a judicial determination of the truth" is unpersuasive even on its own terms.

Because in my view the decision of the Ohio appellate court in this case seriously contravenes the principles of the First Amendment as interpreted by this Court, and threatens to chill the freedom of newspapers in Ohio to publish their view of the facts where they differ with the view of the courts, I dissent and would grant certiorari to review this important question of constitutional law.

DECISION OF UNITED STATES

SUPREME COURT

ON RESPONDENTS' SECOND

REQUEST FOR CERTIORARI

No. 84-1731. LORAIN JOURNAL CO. ET AL. v. MILKOVICH. Sup. Ct. Ohio. Certiorari denied. Reported below: 15 Ohio St. 3d 292, 473 N. E. 2d 1191.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Error and misstatement are inevitable in any scheme of truly free expression and debate. Because punishment of error may induce a cautious and restrained exercise of the freedoms of speech and press, the fruitful exercise of these essential freedoms requires a degree of "breathing space." *NAACP* v. *Button*, 371 U. S. 415, 433 (1963). Accordingly, "we protect some falsehood in order to protect speech that matters." *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 341 (1974); see also *St. Amant* v. *Thompson*, 390 U. S. 727, 732 (1968). The *New York Times* actual malice

standard defines the level of constitutional protection appropriate in the context of defamation of a public official. It rests on our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964). In *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967), the *New York Times* standard was extended to statements criticizing "public figures" because we recognized that "'public figures,' like 'public officials,' often play an influential role in ordering society" and that therefore "[o]ur citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.'" 388 U. S., at 164 (Warren, C. J., concurring in result). In *Gertz* v. *Robert Welch, Inc.*, *supra*, we limited the applicability of the *New York Times* standard by holding that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." 418 U. S., at 347 (footnote omitted).

In this case, the Ohio Supreme Court found *Gertz* rather than *New York Times* applicable to respondent Milkovich's libel suit against petitioners. Ostensibly, then, the issue presented in this petition is simply the narrow one whether petitioners will be required to pay damages upon a showing of negligence or actual malice. However, by allowing damages to be awarded upon a showing of negligence, thereby diminishing the "breathing space" allowed for free expression in the *New York Times* case, the decision in *Gertz* exacerbated the likelihood of self-censorship with respect to reports concerning "private individuals." See 418 U. S., at 365–368 (BRENNAN, J., dissenting). Consequently, the rules we adopt to determine an individual's status as "public" or "private" powerfully affect the manner in which the press decides what to publish and, more importantly, what not to publish. In finding *New York Times* inapplicable, the Ohio Supreme Court read the "public official" and "public figure" doctrines in an exceptionally narrow way that is sure to restrict expression by the press in Ohio. Its decision is especially unfortunate in that it most affects reporting by local papers about the local controversies that constitute their primary content. Moreover, it is these local papers that are most coerced by the threat of libel damages

since they can least afford the expense of damages awards. I therefore dissent and would grant certiorari in order to review this important constitutional question.

I

On February 9, 1974, a melee occurred at a high school wrestling match between Maple Heights and Mentor High Schools; several wrestlers were injured, four of them requiring treatment at a hospital. The Ohio High School Athletic Association (OHSAA) conducted a hearing into the occurrence and censured Michael Milkovich, the Maple Heights coach and a teacher at the high school, for his conduct in encouraging the brawl. In addition, the OHSAA placed the Maple Heights team on probation for the school year and declared it ineligible to compete in the state wrestling tournament. Ted Diadiun, a sports columnist for the News-Herald of Willoughby, Ohio, attended and reported on both the match and the hearing.

A group of parents and wrestlers subsequently filed suit in Franklin County Common Pleas Court, alleging that the OHSAA had denied the team due process and seeking to reverse the declaration of ineligibility. Milkovich, though not a party to this lawsuit, appeared as a witness for the plaintiffs. On January 7, 1975, the court held that the wrestling team had been denied due process and enjoined the team's suspension.

The next day, Diadiun wrote another column entitled "Maple beat the law with the 'big lie.'" Diadiun, who had not attended the court hearing, based the story on a description of the judicial proceedings given him by an OHSAA Commissioner and on his own recollection of the wrestling match and ensuing OHSAA hearing. After reporting the result of the lawsuit, the column stated "[b]ut there is something much more important involved here than whether Maple was denied due process by the OHSAA":

> "When a person takes on a job in a school, whether it be as a teacher, coach, administrator or even maintenance worker, it is well to remember that his primary job is that of educator.
>
> "There is scarcely a person concerned with school who doesn't leave his mark in some way on the young people who pass his way—many are the lessons taken away from school by students which weren't learned from a lesson plan or out of a book. They come from personal experiences with and ob-

servations of their superiors and peers, from watching actions and reactions.

"Such a lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.

"A lesson which, sadly, in view of the events of the past year, is well they learned early.

"It is simply this: If you get in a jam, lie your way out."

Diadiun stated that Milkovich and others had "misrepresented" the occurrences at the OHSAA hearing but that Milkovich's testimony "had enough contradictions and obvious untruths so that the six [OHSAA] board members were able to see through it." Diadiun then asserted that by the time the court hearing was held, Milkovich and a fellow witness "apparently had their version of the incident polished and reconstructed, and the judge apparently believed them." Diadiun opined that anyone who had attended the match "knows in his heart that Milkovich . . . lied at the hearing after . . . having given his solemn oath to tell the truth. But [he] got away with it." The column concluded:

"Is that the kind of lesson we want our young people learning from their high school administrators and coaches?

"I think not."

Milkovich filed a libel action in state court against Diadiun, the News-Herald, and the latter's parent, the Lorain Journal Company (petitioners). The court denied petitioners' motion for summary judgment, but held that Milkovich was a public figure and, as such, was required to meet the standards established in *New York Times*. After five days of trial, at the close of Milkovich's case, petitioners moved for a directed verdict. The court granted this motion, finding that Milkovich's evidence failed to establish actual malice as a matter of law. The Ohio Court of Appeals reversed and remanded. *Milkovich* v. *Lorain Journal Co.*, 65 Ohio App. 2d 143, 416 N. E. 2d 662 (1979). It noted that the Common Pleas Court had accepted Milkovich's testimony, and ruled that this alone constituted sufficient evidence of actual malice to survive a motion for a directed verdict. The Ohio Supreme Court dismissed the appeal as raising no substantial constitutional question. This Court denied certiorari; I dissented. *Lorain Journal Co.* v. *Milkovich*, 449 U. S. 966 (1980).

On remand and before a new judge in the Common Pleas Court, petitioners filed a second motion for summary judgment. The court reaffirmed the earlier holding that Milkovich was a public figure for purposes of the *New York Times* test and granted the motion. The court held that Milkovich had failed to proffer sufficient evidence for a jury to conclude that Diadiun's column was published with actual malice. Alternatively, the court found that the column constituted a privileged expression of opinion. This time the Ohio Court of Appeals affirmed, holding that the law of the case did not bar a second motion for summary judgment and agreeing with both of the trial court's particular holdings.

The Ohio Supreme Court reversed. *Milkovich* v. *News-Herald*, 15 Ohio St. 3d 292, 473 N. E. 2d 1191 (1984). Concluding "upon a careful review of the record" that Milkovich had not waived the right to challenge the earlier determination of his status as a public figure, the court held that Milkovich was neither a "public official" nor a "public figure," and that the contents of the challenged article were facts which, if false, are not protected by the First Amendment. *Id.*, at 294–297, 473 N. E. 2d, at 1193–1196. This petition followed.

II

A

In *New York Times*, we had no occasion "to determine how far down into the lower ranks of government employees the 'public official' designation would extend . . . ." 376 U. S., at 283, n. 23. That question was addressed two Terms later in *Rosenblatt* v. *Baer*, 383 U. S. 75 (1966). Consistent with the premise of *New York Times* that "[c]riticism of those responsible for government operations must be free, lest criticism of government itself be penalized," the Court in *Rosenblatt* held that "[i]t is clear . . . that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs." 383 U. S., at 85. We recognized there, however, that First Amendment protection cannot turn on formalistic tests of how "high" up the ladder a particular government employee stands. Rather, we determined, the focus must be on the nature of the public employee's function and the public's particular concern with his work. Accordingly, we held:

> "Where a position in government has such apparent importance that the public has *an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees*, . . . the *New York Times* malice standards apply." *Id.*, at 86 (emphasis added).

In *Rosenblatt* itself, we found this standard satisfied with respect to Baer, a supervisor of a county ski resort employed by and responsible to county commissioners.

The Ohio court apparently read the language in *Rosenblatt* referring to government employees having "substantial responsibility for or control over the conduct of government affairs" as restricting the public official designation to officials who set governmental policy. This interpretation led it to conclude that finding a public employee like Milkovich to be a "public official" for purposes of defamation law "would unduly exaggerate the 'public official' designation beyond its original intendment." 15 Ohio St. 3d, at 297, 473 N. E. 2d, at 1195–1196.

The Ohio court has seriously misapprehended our decision in *Rosenblatt*. Indeed, the status of a public school teacher as a "public official" for purposes of applying the *New York Times* rule follows *a fortiori* from the reasoning of the Court in *Rosenblatt*. As this Court noted in holding that the Equal Protection Clause does not bar a State from excluding aliens from teaching positions in the public schools, "public school teachers may be regarded as performing a task 'that go[es] to the heart of representative government.'" *Ambach* v. *Norwick*, 441 U. S. 68, 75–76 (1979) (quoting *Sugarman* v. *Dougall*, 413 U. S. 634, 647 (1973)). We have repeatedly recognized public schools as the Nation's most important institution "in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests." 441 U. S., at 76–77. See also *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 29–30 (1973); *Wisconsin* v. *Yoder*, 406 U. S. 205, 213 (1972); *Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954). The public school teacher is unquestionably the central figure in this institution:

> "Within the public school system, teachers play a critical part in developing students' attitude toward government and understanding of the role of citizens in our society. Alone among employees of the system, teachers are in direct, day-

> to-day contact with students both in the classrooms and in the other varied activities of a modern school. In shaping the students' experience to achieve educational goals, teachers by necessity have wide discretion over the way course material is communicated to students. They are responsible for presenting and explaining the subject matter in a way that is both comprehensible and inspiring. No amount of standardization of teaching materials or lesson plans can eliminate the personal qualities a teacher brings to bear in achieving these goals. Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. This influence is crucial to the continued good health of a democracy." *Ambach*, *supra*, at 78–79 (footnotes omitted).[1]

"[T]eachers . . . possess a high degree of responsibility and discretion in the fulfillment of a basic governmental obligation," *Bernal* v. *Fainter*, 467 U. S. 216, 220 (1984),[2] and it is self-evident that "the public has an independent interest in the qualifications and performance" of those who teach in the public high schools that goes "beyond the general public interest in the qualifications and performance of all government employees," *Rosenblatt*, *supra*, at 86.[3] Public school teachers thus fall squarely

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[1] JUSTICE BLACKMUN's dissent in *Ambach*, which I joined, expressed identical sentiments. See 441 U. S., at 86 ("One may speak proudly of the role model of the teacher, of his ability to mold young minds, of his inculcating force as to national ideals, and of his profound influence in the impartation of our society's values").

[2] See also *Board of Education* v. *Pico*, 457 U. S. 853, 864 (1982) (plurality opinion); *Cabell* v. *Chavez-Salido*, 454 U. S. 432, 457, n. 8 (1982); *Zykan* v. *Warsaw Community School Corporation*, 631 F. 2d 1300, 1307 (CA7 1980).

[3] This perfectly obvious conclusion has led at least one other court to reach a conclusion directly contrary to that of the Ohio Supreme Court. See *Johnston* v. *Corinthian Television Corp.*, 583 P. 2d 1101 (Okla. 1978) (grade school wrestling coach is "public official"). On the other hand, the state courts are in general disarray over the application of the *New York Times* standard to various other types of public employees. See Annot., Libel and Slander: Who is a Public Official or Otherwise Within the Federal Constitutional Rule

within the rationale of *New York Times* and *Rosenblatt*. Moreover, Diadiun's column characterized Milkovich's qualifications to teach young students in light of his conduct in connection with the Maple Heights/Mentor High School incident. It is precisely this type of discussion that *New York Times* and its progeny seek to protect.

B

The Ohio Supreme Court also held that Milkovich was not a "public figure" within the meaning of our decisions. It concluded that this Court has "retreated" from prior holdings and "redefined" public figure status to include only two narrowly defined classes of individuals. 15 Ohio St. 3d, at 294–297, 473 N. E. 2d, at 1193–1195. Milkovich was found to fit in neither of these categories. *Ibid.* Here too, the state court misreads our decisions.

Our first encounter with the application of the *New York Times* test to nongovernment officials came in *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967). *Butts* actually decided two separate cases that were consolidated for review. In the first case, Butts, the athletic director at the University of Georgia[4] and "a well-known and respected figure in coaching ranks," *id.*, at 136, filed a libel action after the Saturday Evening Post published an article accusing Butts of having conspired to fix a football game with the University of Alabama. In the second case, Walker, a retired career Army officer who was prominent in the local community, sued the Associated Press after it filed a news dispatch giving an eyewitness account of a riot that erupted at the University of Mississippi when federal officers tried to enforce a court decree ordering the enrollment of James Meredith, a black, as a student at the University. The report stated that Walker had taken command of the violent crowd and personally had led a charge against federal marshals. Although the Court in *Butts* failed to reach a consensus on the standard of liability in suits brought by "public figures," seven Members of the Court agreed that both Butts and

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Requiring Public Officials to Show Actual Malice, 19 A. L. R. 3d 1361 (1968 and 1985 Supp.). I would also grant certiorari to clarify the law in this regard.

[4] Although the University of Georgia was a state university, Butts was employed by the Georgia Athletic Association, a private corporation, rather than by the State itself. His case thus did not raise the issue whether he was a "public official" for purposes of the *New York Times* test. See *Butts*, 388 U. S., at 135, and n. 2.

Walker occupied this status.[5] Justice Harlan explained in his plurality opinion:

> "[B]oth Butts and Walker commanded a substantial amount of independent public interest at the time of the publications; both, in our opinion, would have been labeled 'public figures' under ordinary tort rules. . . . Butts may have attained that status by position alone and Walker by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy, but both commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements." *Id.*, at 154–155.

As Justice Harlan's opinion indicates, the two cases considered in *Butts* exemplify alternative ways in which an individual may become a "public figure."[6] Our subsequent cases have elaborated on this framework; we have held that "[i]n some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts," while "[m]ore commonly, an individual voluntarily injects himself or is drawn into a particular controversy and thereby becomes a public figure for a limited range of issues." *Gertz*, 418 U. S., at 351; see also *Time, Inc.* v. *Firestone*, 424 U. S. 448, 453 (1976); *Hutchinson* v. *Proxmire*, 443 U. S. 111, 134 (1979); *Wolston* v. *Reader's*

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[5] Justices Black and Douglas found it unnecessary to reach the issue consistent with their views that the First Amendment completely prohibits damages for libel. *Id.*, at 170 (Black, J., joined by Douglas, J., concurring in result in Walker's case and dissenting in Butts' case); see also *New York Times*, 376 U. S., at 293 (Black, J., concurring).

[6] Like Butts and Walker, Milkovich would be labeled a "public figure" under ordinary tort rules. See W. Prosser, Law of Torts § 118, pp. 823–824 (4th ed. 1971); cf. *Stryker* v. *Republic Pictures Corp.*, 108 Cal. App. 2d 191, 238 P. 2d 670 (1951); *Molony* v. *Boy Comics Publishers*, 277 App. Div. 166, 98 N. Y. S. 2d 119 (1950); *Wilson* v. *Brown*, 189 Misc. 79, 73 N. Y. S. 2d 587 (1947). Indeed, since in my opinion the scope of the constitutional privilege exceeds that of the privilege recognized at common law for reports about public figures, this fact alone should be sufficient to conclude that Milkovich is a "public figure." However, our subsequent decisions have treated the constitutional privilege without reference to the common-law privilege, *e. g.*, *Time, Inc.* v. *Firestone*, 424 U. S. 448, 453 (1976); *Wolston* v. *Reader's Digest Assn., Inc.*, 443 U. S. 157, 165–169 (1979), and I therefore discuss Milkovich's status under our decisions without reference to the common law.

Digest Assn., Inc., 443 U. S. 157, 164 (1979). However, the ultimate touchstone is always whether an individual has "assumed [a] rol[e] of especial prominence in the affairs of society [that] invite[s] attention and comment." *Gertz*, *supra*, at 345. These categories are merely descriptive; they are not, as the Ohio Supreme Court assumed, rigid, technical standards.

Petitioners spend most of their efforts attempting to analogize their case to that of Butts, and, indeed, the analogy is a strong one.[1] A better argument can be made, however, that Milkovich is a "public figure," like Walker, for purposes of this particular public controversy. Under this prong of "public figure" analysis, an individual who "voluntarily injects himself or is drawn into a particular public controversy" becomes a public figure with respect to public discussion of that controversy. *Gertz*, *supra*, at 351. Walker, for example, was deemed to have "thrus[t] his personality into the 'vortex' of an important public controversy" by allegedly encouraging a riot. Milkovich's conduct was remarkably similar to Walker's—the allegedly libelous publication was inspired by a brawl that resulted in injuries to a number of students;

[1] Like Butts, Milkovich is "a well-known and respected figure in coaching ranks." Indeed, he is unquestionably one of America's outstanding coaches. No other wrestling coach in America has achieved a record even close to his, a fact that has been recognized by numerous organizations. He has received the National Coach of the Year Award, the National Council of High School Coaches Award, the Scholastic Wrestling News National Achievement Award, a United States Wrestling Federation Award, and numerous other gifts, proclamations, and awards. He was inducted into the National Helms Hall of Fame and the Ohio Coaches Hall of Fame and received the Kent State University Hall of Fame Award. He has been cited in the Congressional Record and in the records of both the Ohio Senate and House of Representatives. He was similarly honored by the city of Cleveland and by his own city of Maple Heights, which celebrated "Mike Milkovich Day." He is a much sought after speaker by coaches' associations throughout the United States and conducts wrestling clinics across the country under the aegis of various state and coaches' organizations. See *Milkovich* v. *News-Herald*, 15 Ohio St. 3d 292, 296, and n. 1, 473 N. E. 2d 1191, 1194, and n. 1 (1984). Nor will it do simply to dismiss Milkovich's achievements as merely those of a high school coach. To be sure, as a general matter collegiate athletics obtains wider exposure than high school athletics. But with the exception of a few rather flamboyant figures who gain national exposure, most coaches—like Butts—are unknown outside sports' circles and the local community. Milkovich is probably as well known both locally and in the wrestling community as was Butts in his respective circles.

Milkovich was alleged to have incited the fracas by egging on the crowd. While this fight did not compare in size or ferocity to the riots in which Walker participated at the University of Mississippi, it was a public controversy of concern to residents of the local community, as important to them as larger events are to the Nation. Significantly, it was only in this community that the challenged article was circulated. See *Rosenblatt* v. *Baer*, 383 U. S., at 88 ("The subject matter may have been only of local interest, but at least here, where publication was addressed primarily to the interested community, that fact is constitutionally irrelevant"). The conclusion that Milkovich was a limited purpose public figure therefore seems quite straightforward.

The Ohio Supreme Court nevertheless concluded that Milkovich could not be classed a "public figure" because he "never thrust himself to the forefront of [the] controversy in order to influence its decision." 15 Ohio St. 3d, at 297, 473 N. E. 2d, at 1195. However, the *New York Times* standard is not limited to discussion of individuals who deliberately seek to involve themselves in public issues to influence their outcome. Our decisions in this area rest at bottom on the need to protect public discussion about matters of legitimate public concern. See *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U. S. 749, 755–761 (1985) (opinion of POWELL, J., joined by REHNQUIST and O'CONNOR, JJ.); *id.*, at 763–764 (opinion of BURGER, C. J.); *id.*, at 777–789 (opinion of BRENNAN, J., joined by MARSHALL, BLACKMUN, and STEVENS, JJ.). Although not every person connected to a public controversy is a "public figure," *Gertz*, *supra*, the *New York Times* protections do, and necessarily must, encompass the major figures around which a controversy rages. See *Wolston* v. *Reader's Digest Assn.*, *supra*, at 167; see also *Gertz*, *supra*, at 351 (public figure is one who "voluntarily injects himself *or is drawn* into a particular public controversy" (emphasis added)).[1]

[1] In *Wolston*, we held that although an individual's failure to appear before a grand jury investigating Soviet espionage was newsworthy, "[a] private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." 443 U. S., at 167. Rather, we emphasized, "a court must focus on the 'nature and extent of an individual's participation in the particular controversy giving rise to the defamation.'" *Ibid.* (quoting *Gertz*, 418 U. S., at 352). Because it was "clear that [Wolston] played only a minor role in whatever public controversy there may have been concerning the investigation of Soviet espio-

We only recently acknowledged the "compelling" nature of the local interest in preventing violence and preserving discipline in the Nation's high schools. *New Jersey* v. *T. L. O.*, 469 U. S. 325, 350 (1985). A large fight between the students of two rival schools quite legitimately raises serious concerns for the entire community, particularly when, as here, it results in injury to students.[9] The present controversy centered primarily around the conduct of one man—Milkovich—in encouraging the fight; that conduct allegedly resulted in an OHSAA hearing, his censure by that association, and the disqualification of his team from eligibility in the state wrestling tournament.[10] To say that Milkovich nevertheless was not a public figure for purposes of discussion about the controversy is simply nonsense.

III

The "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times*, 376 U. S., at 270, applies as much to debate in the local media about local issues as it does to debate in the national media over national issues. This Court's *obligation* to preserve the precious freedoms established in the First Amendment is every bit as strong in the context of a local paper's report of an incident at a local high school as it is in the context of an advertisment in one of the Nation's largest newspapers supporting the struggle for racial freedom in the South. Because the decision below will stifle public debate about important local issues, I respectfully dissent.

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nage," he was held not to be a public figure. 443 U. S., at 167. Milkovich, on the other hand, was clearly the major player in this public controversy.

[9] At one point in its opinion, the Ohio Supreme Court cited our holding in *Time, Inc.* v. *Firestone*, 424 U. S. 448 (1976), that Mrs. Firestone's divorce was "not the sort of 'public controversy' envisioned in *Gertz*." 15 Ohio St. 3d, at 296, 473 N. E. 2d, at 1194. The nature of the controversy here is completely different. This was not a private matter of public concern merely to gossips. Rather, the controversy in which Milkovich was involved was of immediate importance to parents and others in the community.

[10] These facts distinguish this case from *Hutchinson* v. *Proxmire*, 443 U. S. 111 (1979). In *Hutchinson*, a hitherto unknown research scientist was allegedly libeled when Senator Proxmire awarded his Government sponsor a "Golden Fleece of the Month Award" to publicize what the Senator perceived to be the most egregious examples of wasteful Government spending. Proxmire argued that Hutchinson became a limited purpose public figure as a result of the publicity surrounding his being awarded a "Golden Fleece." We rejected this argument on the ground that "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Id.*, at 135. The controversy surrounding the fight at the high school, on the other hand, was not created by Diadiun's column. The event itself created a stir, leading to a hearing, censure of Milkovich, and disqualification of his team. Diadiun's column merely reported his view, as an observer of the initial fight, that such a man ought not be allowed to teach young students.

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS, LAKE COUNTY, OHIO, GRANTING DEFENDANTS' MOTION FOR A DIRECTED VERDICT

(Filed May 1, 1978)

Court adjourned to Monday 5/1/1978, Court not pursuant to adjournment. Present and presiding, JOHN F CLAIR, JR., *Judge*, JOHN M. PARKS, *Judge*, Ross D. AVELLONE, *Judge*.

Case No. 75 Civ 0301

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

MICHAEL MILKOVICH, SR.,
Plaintiff,

vs.

THE NEWS-HERALD, *et al.*,
Defendants.

JOURNAL ENTRY

The Court, coming on to consider the Motion of the Defendants for a directed verdict in favor of the Defendants, which Motion was made at the close of the Plaintiff's evidence in the fifth day of trial, and upon consideration of the arguments of counsel, the Court finds that the Motion is well taken and that the said Motion should be and hereby is granted.

The Court finds that reasonable minds can come but to one conclusion, to-wit: that the evidence (construed

most strongly in favor of the Plaintiff) fails to establish by clear and convincing proof that the article which was the subject of this action was published with knowledge of its falsity or in reckless disregard of the truth, and that there is no justiciable issue for the jury. Exceptions to the Plaintiff.

/s/ JOHN F. CLAIR, J.
Judge

JUDGMENT ENTRY OF THE COURT OF APPEALS OF OHIO, ELEVENTH DISTRICT, COUNTY OF LAKE

(Filed December 3, 1979)

Case No. 6-287

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

MICHAEL MILKOVICH,
Appellant,

vs

THE LORAIN JOURNAL COMPANY, *et al.*,
Appellees.

JUDGMENT ENTRY

This cause came on to be heard upon the record in the Trial Court, and was briefed and argued by counsel for the parties.

Upon consideration whereof, this Court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and the judgment of the Trial Court is reversed. Each Assignment of Error was reviewed by the Court and disposed of as set forth in this Court's Opinion which is incorporated hereby by reference.

No other error appearing in the record, judgment reversed and cause remanded for further proceedings. Cook, J., dissents. See Dissenting Opinion.

It is ordered that appellant recover of appellee the costs herein.

It is ordered that a special mandate issue out of this Court directing the Trial Court to carry this judgment into execution. A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ EDWIN T. HOFSTETTER
Judge
For the Court

(CONNORS, *J.*, of the 6th Appellate District, sitting for DAHLING, *P.J.*)

COOK, *J.*, Dissents
(See Dissenting Opinion)

OPINION OF THE COURT OF APPEALS OF OHIO, ELEVENTH DISTRICT, COUNTY OF LAKE

(Dated December 3, 1979)

Case No. 6-287

COURT OF APPEALS OF OHIO
ELEVENTH DISTRICT
COUNTY OF LAKE

MICHAEL MILKOVICH,
Plaintiff-Appellant,

vs.

THE LORAIN JOURNAL COMPANY, et al.,
Defendant-Appellees.

OPINION

Judges:

HON. EDWIN T. HOFSTETTER, *J.*; HON. ROBERT E. COOK, *J.*;

HON. JOHN J. CONNORS, JR., *J.*, Sixth District, by Assignment, for HON. ALFRED E. DAHLING, *P.J.*

HOFSTETTER, *J.*

The matter on appeal came on for trial before a jury. After the plaintiff-appellant rested his case, the defendants jointly moved the Court for a directed verdict in their favor on the ground that there is no justiciable issue for the jury, and that reasonable minds can come but to one conclusion, to-wit, that the proof fails to evidence by clear and convincing proof that the article which is the subject of this action was published with knowledge of its falsity or with reckless disregard as to its truth.

The trial court granted the motion in favor of the defendants, as follows:

> The Court finds that reasonable minds can come to but one conclusion, to-wit: that the evidence (construed most strongly in favor of the Plaintiff) fails to establish by clear and convincing proof that the article which was the subject of this action was published with knowledge of its falsity or in reckless disregard of the truth, and that there is no justiciable issue for the jury. Exceptions to the Plaintiff.

It is from this judgment, granting a directed verdict for the defendants, that plaintiff has appealed.

As background, the complaint in the court below was an action in libel filed by the plaintiff-appellant, Michael Milkovich, against the defendants, The Lorain Journal Publishing Company, owner and publisher of the Willoughby News-Herald, and Mr. Theodore Diadiun, as the result of the publication of a certain article on January 8, 1975. The article in question was stipulated at trial and admitted into evidence as plaintiff's Exhibit "D." (T.p. 12.)

The events which led to the eventual publication of this alleged libelous article began on the evening of February 9, 1974, at a routine high school wrestling match between Mentor High School and Maple Heights High School. The latter team was coached by the now-retired Michael Milkovich, appellant herein. It appears that, during and shortly after a wrestling match between Bob Girardi of Maple Heights and Paul Pochatilla of Mentor High School, a melee broke out among the fans and spectators in the crowd, and among the wrestling participants themselves. One of the defendants, Ted Diadiun, a sportswriter for The News-Herald, wrote a series of articles following the occurrence.

Following the altercation, a series of hearings were conducted by the Ohio High School Athletic Association (OHSAA) in Columbus, Ohio, following which the Maple team was totally suspended from state competition, and the appellant, Michael Milkovich, was censured.

It was at this time that a group of parents and wrestlers filed suit in Franklin County Common Pleas Court in an action styled "Barret v. Ohio High School Athletic Association." It was held by that Court that the OHSAA failed to safeguard certain due process rights in suspending the team from state competition, thereby denying the team members of important property rights without due process of law.

Immediately after the announcement of Judge Martin's decision reinstating the Maple team to state competition, the defendants published the alleged libelous article which headlined, "Maple Beat The Law With The Big Lie."

Factually, therefore, it should be noted that, following the alleged melee between the Maple and Mentor wrestling crowds, and as a result of hearings, the Ohio High School Athletic Association (OHSAA) suspended the Maple team from state competition. Defendant Diadiun attended both the wrestling meet between the two teams as well as the OHSAA hearing. The subsequent action against the OHSAA in Franklin County was brought to determine whether certain due process rights were accorded the Maple team before it was suspended from state competition. The defendant Diadiun did not attend that hearing. In the Franklin County trial had on November 8, 1974, the decision announced on January 7, 1975, as noted by the appellees in their brief, reversed the administrative action (of suspension). The reversal was on procedural grounds.

Pertinent to further discussion of defendants-appellee's publication on January 8, 1975, of the article which was headlined "Maple Beat The Law With The Big Lie" are the following statements made during the cross-examination of Diadiun:

Q. Now, when did you first become aware of the fact that this was a due process hearing and not a fault-finding hearing, if ever you became aware of it?

A. I thought that the fault-finding would be included in the trial, yes. I knew that due process was one of the issues. I also thought that one of the issues were (sic) whether or not—who was at fault.

• • • • •

Q. Isn't it a fact, Mr. Diadiun, that you never read any transcript of what occurred at that trial until after you published the article?

A. Yes.

• • • • •

Q. Didn't you think it was necessary for you to read that decision (of Judge Paul Martin of the Franklin County Common Pleas Court) before you published such an article?

A. Like I said, I knew the background of the whole case. I knew what Dr. Meyer told me went on at that trial. I didn't feel that I needed—

• • • • •

Q. The fact of the matter is, you never took the trouble to find that decision and read it, did you?

• • • • •

A. I didn't find the decision, no.

Q. You didn't find it necessary to read it?

A. No.

With the above as a fair predicate of the facts pertinent to our discussion of the directed verdict, the plaintiff-appellant assigned ten errors, as follows:

1. The Court erred in granting the motion of defendant-appellee for directed verdict at the close of testimony of the plaintiff;

2. The Court erred in its ruling that plaintiff failed to meet the burden of proof by clear and convincing evidence at the close of the testimony of the plaintiff, and that it was a necessary element for purposes of ruling upon a Motion For Directed Verdict;

3. The Court erred in its ruling that plaintiff was severely lacking in any evidence to prove defendants published the Article with "knowledge of its falsity";

4. The Court erred in its ruling by applying the incorrect law of Libel i.e. the Actual Malice test by omitting the proposition of law that the publisher acted with "*total disregard for truth or falsity*" and basing its findings exclusively upon the facts and law that plaintiff was severely lacking in any evidence to prove defendants published the Article with "*knowledge of its falsity*";

5. The Court erred in failing to apply the legal standards set forth in Rule 50(A) (4), in ruling upon defendant's Motion For Directed Verdict;

6. Should the Appellate Court apply Rule 50(A)(4) to the trial proceeding and ruling in the lower

court, then Appellant alleges the trial court erred in effect in its findings that:

(a) That reasonable minds could not draw different inferences or conclusions from the evidence presented, relevant to the Actual Malice test i.e. knowledge of its falsity, and/or defendant's total disregard for truth or falsity;

(b) That reasonable minds could come to but one conclusion, after construing the evidence most strongly in favor of the plaintiff, that there was no dispute, doubt, conflicting testimony, question, or any evidence in plaintiff's case to prove that defendant acted with Actual Malice i.e. knowledge of its falsity, and/or total disregard for truth or falsity in publishing the alleged libelous publication.

7. The Court erred in denying appellant the right to introduce into evidence the transcript of the record of the case of Ray Barrett v. OHSAA in the Court of Common Pleas, Franklin County;

8. The Court erred in its ruling upon defendant's Motion for Directed Verdict, by failing to mention the requirement set forth in Ohio Rule 50(E); and in fact, not construing the evidence most strongly in favor of the plaintiff;

9. The Court erred in its ruling by holding in effect that there was no controversial evidence of any determinative issue for the jury to weigh and that to submit the case to the jury would permit them an opportunity to do unreasonable harm to the parties.

10. The Court erred in its ruling that the defendants acted upon a reliable source.

In the instant case we have some of the attributes of *New York Times Co. v. Sullivan*, 376 U. S. 254, 11 L. Ed. 2d 686. However, we have the additional element involved that the alleged lies spoken of in the news article were made after judicial ascertainment of where the truth lay as it concerned the trial in which the alleged lies were supposedly uttered.

The *Sullivan* case, as we understand it, stands for the proposition that a public official or person such as the plaintiff herein is prohibited from recovering damage for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

All assignments except No. 7 and 10 direct themselves to the impropriety of granting the directed verdict. In furtherance of our above commentary, we hold that the trial court did err. In typical cases such as *Sullivan*, the libel alleged had still to be subjected to judicial process to determine whether libel existed. In the instant case, a court of law, based on the evidence before it, and having the right to determine where the truth lay, even though on a due process question, determined the truth in favor of the plaintiff and the wrestling team he coached. Thus he had his day in court and was, at that time at least, exonerated by the only recognized arbiter of the truth in our American judicial system but thereafter was still called a liar for the testimony he allegedly gave during that trial. Had the news article simply stated that the Court, in the newspaper's judgment, erred, or that the reporter's understanding of the facts differed from that of the Court, no question of libel would be before us. It would appear that, though the press might be at liberty to criticize the judicial process and the results of a given

case, unless and until the judgment of the Court is overturned on appeal, the determination of what constitutes the truth has been made. Thus any news article written either as fact as a news item, or as opinion, that is published knowing that it conflicts with a judicial determination of the truth, may, in our opinion, be regarded as a reckless disregard of the truth so as to constitute "actual malice" so as to be actionable libel of a public person. Whether in a given case, it constitutes a reckless disregard of the truth, is not, in our opinion, a question of law, but a question of fact based on the evidence before the Court.

Thus, where the evidence includes the factual data that (1) a decision was rendered by a trial court in Franklin County on a related matter, (2) that the defendant Diadiun acknowledged he knew such decision was rendered in favor of the plaintiff herein and his team of wrestlers, (3) that he did not attend that trial, and (4) that he did not read the transcript of that trial, it would appear that it is a jury question as to whether the reporter and his newspaper acted with reckless disregard of the truth.

We recognize that it has long been held that a motion for directed verdict raises a question of law only. *Michigan-Ohio-Indiana Coal Assn. v. Nigh, Admx.*, 131 Ohio St. 405. Further, if the facts are undisputed, this issue is one for the Court, but, where the circumstances are such that reasonable minds might reach different conclusions as to inferences to be drawn from the undisputed evidence, there arises a question of fact for the jury: *Bennett v. Sinclair Refining Co.*, 144 Ohio St. 139, 57 NE(2d) 776; *Snider v. Rollins*, 102 Ohio St. 372, 131 NE 733; *Slyder v. Commissioners*, 133 Ohio St. 146, 12 NE(2d) 407; *Yackee v. Napoleon*, 135 Ohio St. 344, 21 NE(2d) 111; *Hamden Lodge v. Ohio Fuel Gas Co.*, 127 Ohio St. 469, 189 NE 246.

For the reasons indicated, we find all assignments, except No. 7 and 10, at least to the extent they relate to the order granting a directed verdict for the defendants, are well taken.

Assignment No. 7, in our opinion, is without merit. The trial judge in that case was the arbiter of the facts. It was his duty to weigh and decide what was determined by the evidence. That determination having been made by that court, its judgment is final unless reversed on appeal. The question of whether the defendants had a justifiable basis for the publication of the "big lie" article so as to exonerate the defendants from either "actual malice" or such reckless disregard of the truth as to constitute malice as set forth in *Sullivan*, must, in our opinion, be predicated on the trial court's decision in that case and not on the evidence elicited therein.

Assignment No. 10, that the Court erred in its ruling that the defendants acted upon a reliable source, is well taken, although not for the reasoning expressed by the appellant. The reliability and believability of the source is for the trier of facts. Paragraphs 3 and 4 of the syllabus in *O'Day v. Webb*, 29 Ohio St. 2d 215, are pertinent, to wit:

> 3. A motion for directed verdict or a motion for judgment notwithstanding the verdict does not present factual issues, but a question of law, even though in deciding such a motion, it is necessary to review and consider the evidence.
>
> 4. It is the duty of a trial court to submit an essential issue to the jury when there is sufficient evidence relating to that issue to permit reasonable minds to reach different conclusions on that issue, or, conversely, to withhold an essential issue from the jury when there *is not* sufficient evidence relating to that issue to permit reasonable minds to reach different conclusions on that issue.

We think the trial court erred in considering the question of the reliability of the source of the "defamatory" statements published when the basis for ruling on a directed verdict is not based on factual issues but on questions of law.

For the reasons indicated, the judgment of the trial court is reversed and the cause remanded for further proceedings.

JUDGE EDWIN T. HOFSTETTER

COOK, *J.* dissents (See Dissenting Opinion)
CONNORS, *J.*, concurs
(CONNORS, *J.*, of the 6th
Appellate District,
sitting for DAHLING, *P.J.*)

COOK, *J.* (Dissenting Opinion)

I respectfully dissent from the majority opinion of the Court.

The sole question in the instant cause is whether the trial court erred in granting appellee's motion for a directed verdict at the conclusion of the appellant's evidence.

Civ.R.50, in pertinent part, states:

> "(4) When granted on the evidence. When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is

adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."

A review of the evidence offered by the appellant in the proceedings below indicates reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion was adverse to the party against whom the motion was directed, the appellant.

The benchmark case in the libel law in the United States is *New York Times v. Sullivan*, 376 U.S. 254. In the *New York Times* case, the United States Supreme Court stated at pages 279-280:

> "The constitutional guaranty of freedom of speech and press prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice', that is, with knowledge that it was false or with reckless disregard of whether it was false or not; such a qualified privilege of honest mistake of fact is required by the First and Fourteenth Amendments."

In *Curtiss Publishing Co. v. Butts*, 388 U.S. 130 the United States Supreme Court extended the First Amendment safeguards of the *New York Times* case to those defending libel actions brought by public figures as well as public officials. Appellant was found by the trial court to be a public figure.

Here, the newspaper article written by Ted Diadiun of the Willoughby News Herald was based on what he had personally observed at the wrestling match where the incident occurred and the testimony he had personally heard appellant give at the hearing before OHSAA and what he had supposedly learned about appellant's testimony

at a judicial hearing in the Franklin County Common Pleas Court from Dr. Harold Meyer, Commissioner of the OHSAA, in a telephone conversation. Diadiun concluded appellant had lied in the Franklin County court proceedings.

The important question is whether Ted Diadiun wrote his article with "actual malice" towards appellant, as required by the *New York Times* case. In other words, did Diadiun write his article knowing it was false or with reckless disregard of whether it was false or not.

At the conclusion of appellant's evidence in the court below, there was no evidence before the court that Diadiun wrote the article with "actual malice" against the appellant.

Rather, the evidence indicated Diadiun wrote the article based on his personal observations as to what occurred at the wrestling match and what appellant testified to at the OHSAA hearing in addition to what Dr. Meyer had indicated to him about appellant's testimony in court. Based on these sources of information, Diadiun expressed his opinion as to the statements of appellant in the Franklin County court proceedings. Appellant believed his article to be true.

I am of the opinion the article written by Diadiun falls within the limits of the court's words at page 269 of the *New York Times* case:

> "It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions, and this opportunity is to be afforded for vigorous advocacy no less than abstract discussion."

I would affirm the judgment of the trial court.

/s/ ROBERT E. COOK

JUDGMENT ENTRY ERRATA

(Filed December 21, 1979)

Case No. 6-287

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

STATE OF OHIO,
LAKE COUNTY, *ss.*

MICHAEL MILKOVICH,
Appellant,

vs.

LORAIN JOURNAL CO., *et al.*,
Appellees.

JUDGMENT ENTRY ERRATA

It coming to the attention of this Court that an error exists on Page 3, Line 2 of the Dissenting Opinion of Judge Robert E. Cook, dated December 3, 1979, this Court sua sponte orders the Clerk of the Court of Lake County to strike the word "appellant" at said place in said Dissenting Opinion and, by pen, insert the word "appellee".

/s/ ROBERT E. COOK
Judge
For the Court

ORDER OF THE SUPREME COURT OF OHIO DISMISSING THE APPEAL

(Dated March 20, 1980)

No. 80-107

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

MICHAEL MILKOVICH,
Appellee,

vs.

LORAIN JOURNAL COMPANY, *et al.*,
Appellants.

APPEAL FROM THE COURT OF APPEALS
FOR LAKE COUNTY

This cause, here on appeal as of right from the Court of Appeals for Lake County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Lake County for entry.

ORDER OF THE SUPREME COURT OF OHIO OVERRULING THE MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS TO CERTIFY ITS RECORD

(Dated March 20, 1980)

No. 80-107

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

MICHAEL MILKOVICH,
Appellee,

vs.

THE LORAIN JOURNAL COMPANY, *et al.*,
Appellants.

MOTION FOR AN ORDER DIRECTING
THE COURT OF APPEALS
FOR LAKE COUNTY
TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

ORDER OF THE SUPREME COURT OF OHIO DENYING REHEARING

(Dated April 25, 1980)

No. 80-107

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

MICHAEL MILKOVICH,
Appellee,

vs.

LORAIN JOURNAL COMPANY, *et al.*,
Appellants.

REHEARING

It is ordered by the court that rehearing in this case is denied.

OPINION OF THE COURT OF COMMON PLEAS, LAKE COUNTY, OHIO

(Filed September 4, 1981)

Case No. 75 CIV 0301

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

MICHAEL MILKOVICH, SR.,
Plaintiff,

vs.

THE NEWS HERALD, *et al.*,
Defendants.

OPINION

Defendant The News Herald of Willoughby, Ohio, published a column written by Ted Diadiun on January 8, 1975, containing the following headline, "Maple beat the law with the 'big lie' ". The article takes issue with plaintiff, Michael Milkovich, head wrestling coach for the Maple Heights Wrestling team, specifically criticizing him for his actions and conduct while coaching one of the team's matches.

The incident in question arose on February 9, 1974, when Maple Heights was wrestling Mentor. During the match, a controversial call ignited a disturbance involving both teams. A subsequent hearing conducted by the Ohio High School Athletic Association (OHSAA) resulted in censoring Milkovich, placing the Maple Heights team on probation and declaring the Maple Heights team ineligible from further state wrestling tournament competition that year.

Thereafter, concerned parents and involved wrestlers filed a law suit in Franklin County Common Pleas Court claiming that they had been denied due process at the OHSAA hearing. Mr. Milkovich was a witness at this proceeding, though he was not a party thereto. Upon completion, the court held that complainants were in fact denied due process. Further, the court ordered that the suspension previously imposed by the OHSAA Board be removed. *Barrett v. Ohio High School Athletic Assn.*, Case No. 74 Civ 09-3390 (Ct. Common Pleas, Franklin County, Ohio, January 7, 1975).

It is undisputed that Diadiun attended both the wrestling match and the OHSAA hearing, and that he did not attend the due process proceeding in Franklin County. Nor did Diadiun read the transcript of the latter or review the actual opinion rendered by the Franklin County judge. Rather, he wrote a column based upon his own recollection of what had transpired at the two events he attended, supplemented by an oral accounting of what was testified to at the Franklin County proceedings by Dr. Harold Meyer, who also attended the OHSAA hearing.

In the article in question, Diadiun suggests that Milkovich "misrepresent[ed]" the facts as presented to the OHSAA Board of Control and that when testifying before Judge Paul W. Martin of the Franklin County Court of Common Pleas he "apparently had [the] version of the incident polished and reconstructed, and the judge apparently believed [him]." In closing the article, Diadiun alleges to the fact that anyone who "attended . . . knows in his heart that Milkovich . . . lied at the hearing after having given his solemn oath to tell the truth."

A libel suit, captioned *Milkovich v. The News Herald, et al.*, Case No. 75 CIV 301 (Ct. C.P. Lake County, Ohio), was filed naming Ted Diadiun, The News Herald of Willoughby, Ohio, and the latter's parent corporation as defendants. At the close of plaintiff's case in chief, defendants' moved for a directed verdict. This Court's predecessor, in granting the Motion for a Directed Verdict, wrote that construing the evidence most strongly in plaintiff's favor, such evidence "fails to establish by clear and convincing proof that the article . . . was published with knowledge of its falsity or in reckless disregard of the truth."

Plaintiff appealed the decision to the 11th District Court of Appeals of Ohio wherein the granting of the directed verdict was reversed and the cause remanded to this Court. *Milkovich v. Lorain Journal Co.*, 65 Ohio App. 2d 143, 416 N.E. 2d 662 (Ct. App. Lake County 1980).

Defendants then filed an appeal with the Ohio Supreme Court. In dismissing the appeal and denying defendants' Writ of Certiorari, the Court stated that no "substantial constitutional issue" was raised. Again a Writ of Certiorari was instituted, this time with the United States Supreme Court. This was subsequently denied. However, Mr. Justice Brennan issued a dissenting opinion, wherein he questioned the rationale of the 11th District Court of Appeals reversing the Lake County Court of Common Pleas and ordering the Court to reinstitute trial proceedings. *Lorain Journal Co., et al. v. Milkovich*, No. 80-100 (U. S. Sup. Ct. November 3, 1980).

In rendering its decision, the Court has considered the pleadings, the briefs, the applicable law and, through counsels' oral stipulation at the May 26, 1981, motion hearing, the incorporation by reference of all the previously filed documentary evidence in testimonial form relative to this case.

The first trial Court made a determination that plaintiff Michael Milkovich was a public figure within the meaning of *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 154-55 (1967). This Court concurs in this finding.

The standard for reviewing defamation claims against public figures evolved from the landmark case of the *New York Times v. Sullivan*, 376 U.S. 254 (1964), where the United States Supreme Court held that the First Amendment of the United States Constitution,

> prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' - that is with knowledge that it was false or with reckless disregard of whether it was false or not.

Id. 376 U.S. at 279-80.

As a public figure, plaintiff must sustain the burden of proving that the article's libelous statements were made with actual malice. Constitutional protection afforded under the *New York Times* standard, *supra*, does not extend to a calculated lie or a statement written with reckless disregard for its truthfulness. However, utterances which are honest though inaccurate, are afforded protection. *Garrison v. Louisiana*, 370 U.S. 64, 75 (1964). *See generally, Time Inc. v. Pope*, 401 U.S. 279 (1971).

Traditionally, opinions were afforded a qualified privilege in libel actions if they amounted to "fair comment" on matters of public concern. This shield has been expanded by subsequent case law.

Today, opinions based on disclosed facts, dealing with matters publicly known, are absolutely privileged.

As stated originally in *Gertz v. Welch*, 418 U.S. 323, 339-40 (1974),

> [u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the consciences of judges and juries, but on the competition of other ideas.

See also Hoag v. Charlotte Republican Tribune, 5 Media L. Rptr. 1535, 1540 (Mich. Cir. Ct., Eaton County 1979).

Examining the applicable standard in cases similar to the one at bar, the Court finds that plaintiff, in order to successfully obtain a libel recovery, must establish that the article was published with actual malice. Particularly, he must set forth proof of convincing clarity that the publication was false or that the writer had serious doubts about its truth. This constitutes reckless disregard for the truth. *See, New York Times, supra* 376 U.S. at 286; *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Beckley Newspapers v. Hanks*, 389 U.S. 81, 83 (1967).

When a suit involves a public figure and/or a public official, the plaintiff must sustain the burden of proving a calculated falsehood. *Curtis v. Butts*, 388 U.S. 130, 153 (1967).

Furthermore, a defendant, in accordance with the *New York Times* standard, is not required to have even a reasonable belief regarding the truth of his publication. Merely that the defendant had no actual knowledge of the article's falsity or that he entertained no serious doubts as to its truth, is sufficient to successfully defeat a defamation claim. *Garrison v. Louisiana*, 379 U.S. 64, 78-79 (1964).

The Supreme Court of the United States held that the "reckless component of the actual malice" standard is not to be inferred from defendant's simple failure to act in conformity with the conduct of a prudent or reasonable reporter. *St. Amant, supra*, 390 U.S. at 731. *Pierce v. Capital Cities Communications, Inc.*, 576 F. 2d 495, 508 (3rd Cir. 1978), *cert. denied*, 439 U.S. 861 (1978). As in the *New York Times* case, *supra*, negligence on the part of a defendant in failing to ascertain the accuracy of its copy will not sustain a finding of actual malice. Proof of actual malice entails more than the establishment of simple negligence. As emphasized in *St. Amant v. Thompson, supra*,

> reckless conduct is not measured by whether a reasonably prudent man would have published or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

Id., 390 U.S. at 731. Fallibility is a human characteristic. As such, even the most skilled are prone, on occasion, to unwittingly commit an error or misstate a fact. *See also Hoffman v. Washington Post Co.*, 433 F. Supp. 600, 605 (Wash. D.C. 1977).

Likewise, courts have held that expressions of the writer's opinion can be forthright and critical. The fact that an opinion article subjects the plaintiff to public ridicule will not support plaintiff's claim of libel. Where a writer expresses his own personal opinions about the actions of another, regardless of how unreasonable or vituperous they may be, they remain the views of the writer and cannot be the basis for a libel suit. *Hotchner v. Cas-*

tillo-Puche, 551 F. 2d 910, 913 (2d Cir. 1977), *cert. denied*, 434 U.S. 834 (1977); *See also*, *Gertz*, *supra*, 418 U.S. at 339-40; *Buckley v. Littell*, 539 F. 2d 882, 893 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977).

Use of the term "liar" in an article which challenges another's veracity was found by this Court, in several cases, to constitute an expression of opinion. As in *Bennett v. Transamerican Press*, 298 F. Supp. 1013 (S.D. Iowa C.D. 1969), a charge of "liar" levied against a legislator was held to be merely an expression of the writer's opinion and not libelous under the *New York Times* standard. Similarly, the Court of Appeals in Illinois has also ruled that use of the term liar, in the appropriate content, would not be libelous. *See Wade v. Sterling Gazette Co.*, 56 Ill. App. 2d 101 (1965).

Traditionally, courts have placed a premium on free debate. Erroneous opinions are inevitable. But even the erroneous opinion is to be tolerated in order that self censorship not prevail over robust public debate.

After carefully examining the article in question, the Court is in disagreement with plaintiff's contention that it is a statement of fact and not one of opinion. Both the tone, the choice of language and the article's editorial format leave no room for doubt that Mr. Diadiun's purpose was to convey a heartfelt editorial, albeit highly emotional. Nonetheless, this article falls within the realm of opinion, and not within the scope of a factual news account.

Mr. Diadiun's article presents a social commentary recapitulating three separate incidents: a wrestling match fracas, a subsequent proceeding before OHSAA and a due process hearing in the Franklin County Court of Common Pleas. The column is replete with phraseology expressing

Mr. Diadiun's personal views. The article speaks of lessons to be learned, of the preeminent position of educators, of the latter's function as role models, of the susceptibility of young people and also of whether "might makes right". Indicative of the Court's finding that the article constitutes editorial comment is Diadiun's utilization of the following language: "[i]f you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up"; "I was in the unique position of being the only non-involved party"; "[t]o anyone who was at the meet"; "But unfortunately, . . . [they] apparently had their version of the incident polished", and finally "Anyone who attended the meet . . . knows in his heart that [they] . . . lied."

Plaintiffs next argue that even if the article is opinion, defendant's failure to disclose the facts upon which the column is based transforms it into a factual article, eliminating its privileged status. Plaintiff's statement of the law is accurate. However, the Court does not find that the facts support a finding that the author failed to fully disclose the basis upon which his opinions were formulated. *Accord*, *Pease v. Telegraph Publishing*, 7 Media Law Rptr. 1114, 1115-6 (New Hamp. 1981).

Mr. Diadiun states in the article that he attended and covered the wrestling match in question. He also was present at the OHSAA hearing. And while absent from the due process proceedings in Franklin County, he did obtain, first hand, a recounting from an observer by the name of Dr. Harold Meyer, who was also present at the OHSAA hearing.

Plaintiff, both in his brief and in Diadiun's depositions, raises the issue of Diadiun's awareness that the Franklin

County proceedings was a due process hearing and not a trial on the merits. While some confusion may have been present as to Diadiun's perception of these proceedings, this confusion was not conveyed in the article. Paragraph three of the article relates, without a doubt, that the sole issue before the Franklin County Court was the denial of due process.

Furthermore, a close reading of the Franklin County decision verifies only that Maple Heights High was found to have been denied particular procedural safeguards required by due process by the OHSAA hearings. That Court made no factual determination as to what transpired on the night in question. Wherefore, plaintiff's contentions that Diadiun's article was written with full knowledge that it conflicted with a judicial determination of the truth is not well taken.

The Court finds as a matter of law that the article in question is an editorial column. As such, the plaintiff cannot, within the confines of constitutional law, recover in a libel action.

Even assuming for the moment, that the privilege afforded is not applicable, plaintiff has failed to prove his case by the clear and convincing weight of the evidence standard, imposed on libel cases. *Gertz, supra,* 418 U.S. at 342; *New York Times, supra,* 376 U.S. at 285-86. It is plaintiff's burden to set forth the evidence he will introduce at trial substantiating his claims of constitutional malice. *Fadell v. Minneapolis Star & Tribune Co., Inc.,* 557 F. 2d 107, 108 (7th Cir. 1977), *cert. denied,* 434 U.S. 966 (1977); *Craig v. Moore,* 4 Med. L. Rptr. 1402 (Fla. Cir. Ct. Duval County 1978). *See Wasserman v. Time Inc.,* 424 F. 2d 920, 922 (D.C. Cir. 1970), *cert. denied,* 398 U.S. 940 (1970).

The issue of malice must be set forth by the plaintiff with convincing clarity. The Court, in applying this standard, is bound to examine only that evidence pertinent to the resolution of material questions of fact. Absent plaintiff's ability to persuade the trier of fact by presenting clear and convincing evidence regarding the issue of malice, movant would be entitled to a judgment as a matter of law. *Fadell, supra,* 557 F. 2d at 108; *See Dupler v. Mansfield Journal Co., Inc.,* 64 Ohio St. 2d 116, 413 N.E. 2d 1187 (1980); *Hahn v. Kotten,* 43 Ohio St. 2d 237, 331 N.E. 2d 713 (1975).

Furthermore, plaintiff cannot rest on mere allegations and arguments. Nor can he stand on the defense that disputes of nonmaterial fact conceivably could be resolved in plaintiff's favor. *See generally Thompson v. Evening Star Newspaper Co.,* 394 F. 2d 774 (D.C. Cir. 1968), *cert. denied,* 393 U.S. 890 (1968).

Plaintiff's proof necessarily must consist of evidence of convincing clarity and of sufficient probative value to manifestly demonstrate on defendant's part a knowing falsity or a reckless disregard for the truth. *Bon Air Hotel, Inc. v. Time, Inc.,* 426 F. 2d 858 (5th Cir. 1970). In effect, the burden of proceeding forward shifts to the plaintiff to affirmatively demonstrate that he can document proof of actual malice at trial. *United Medical Laboratories v. Columbia Broadcasting System, Inc.,* 404 F. 2d 706 (9th Cir. 1968), *cert. denied,* 394 U.S. 921 (1969); *Drye v. Mansfield Journal Corp.,* 32 Ohio Misc. 70, 288 N.E. 2d 856 (Ct. Common Pleas, Richland County 1972).

Unlike the general civil practice that summary judgments should be sparingly granted, use of the summary judgment route in defamation cases is the rule rather than the exception. As was stated in *Washington Post Co. v. Keogh,* 365 F. 2d 965, 968 (D.C. Cir. 1966),

> One of the purposes of the [New York Times] principle . . . is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights . . . . The threat of being put to the defense of a lawsuit brought by a public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself, especially to the advocates of unpopular causes.

See also. Guitar v. Westinghouse Electric Co., 396 F. Supp. 1042, 1053 (S.D.N.Y. 1975).

To require that these defendants incur the expense of a trial, in a matter where no clear and convincing proof of constitutional malice has been presented by documentary evidence in testimonial form, would be against the tenets of the *New York Times* doctrine. Clearly, such an abrogation contravenes the plethora of constitutional authority to the contrary. A plaintiff who is a public figure, must of necessity, make a more persuasive showing than that required of a private citizen in order to defeat a movant's motion for summary judgment. Plaintiff, in the instant cause of action, has not met this burden of proof. *See, Loeb v. New Times*, 497 F. Supp. 85 (S.D.N.Y. 1980).

The protection afforded the freedom of speech clause of the First Amendment was recently addressed by the United States Supreme Court in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). Therein the *Bellotti* court wrote,

> [t]he freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of substantial punishment. . . . Freedom of discussion, if it would

> fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period. *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940).

In summary, in order for a Court to properly grant a motion for summary judgment, where privilege is involved, defendant needs to show that plaintiff has not alleged facts, which, if proven, would be sufficient to support his contention that defendants had acted with malice, both in the writing and in the printing of the article in question. Plaintiff's documentary evidence fails to substantiate the existence of actual malice by clear and convincing proof.

In the case at bar, two divergent interpretations of a series of distinct, yet intertwined, events are presented. In the process, a column was written expressing the view that plaintiff had lied while under oath testifying before a due process hearing in Franklin County. A close examination of that case, entitled *Barrett v. Ohio High School Athletic Association, supra,* underscores the point that no judicial determination or finding of fact was rendered. Nor did the Court of Common Pleas of Franklin County comment on the events or the actions undertaken by the litigants at bar. Rather, it was presented with and addressed only the issue of procedural due process. Absent this factual determination, plaintiff's proof of actual malice fails when measured against the required standard of clear and convincing proof.

This Court holds that defendant's Motion for Summary Judgment must be granted. This Court finds that the article in question constitutes editorial opinion. Further, the Court finds ample disclosure upon which defendant Diadiun bases his opinions. Therefore, this article is

afforded constitutional protection and cannot serve as the basis for a defamation suit.

Furthermore, were this Court to find that the article in question was predominately a factual one, summary judgment is still appropriate due to plaintiff's failure to establish a prima facie existence of actual malice. Applying the standard as outlined above to the facts in the instant case, and construing the same most strongly in the favor of the non-moving plaintiff, the Court finds that there is no quantum of evidence upon which a trier of fact could find proof of convincing clarity relative to the issue of actual malice.

Therefore, the Court finds that reasonable minds can come to one conclusion, said conclusion being adverse to the non-moving party. Accordingly, defendant's Motion for Summary Judgment is granted as a matter of law.

Exceptions are noted for the plaintiff.

Prevailing counsel shall prepare a Judgment Entry signed by counsel in accordance with this Court's Opinion.

/s/ JAMES W. JACKSON
Judge of the Court of Common Pleas

JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS, LAKE COUNTY, OHIO GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed September 28, 1981)

Case No. 75 CIV 0301

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

MICHAEL MILKOVICH, SR.,
Plaintiff,

vs.

THE NEWS HERALD, *et al.*,
Defendants.

JOURNAL ENTRY JUDGMENT

This cause came on to be heard by leave of court first obtained and pursuant to Ohio Civil Rule 56 upon the pleadings, the Defendant's Motion for Summary Judgment, the affidavits, depositions, stipulations of counsel, including the incorporation by reference of the previously filed documentary evidence in testimonial form relative to the case, and the briefs of counsel.

The Court being fully advised in the premises, finds in favor of the Defendants and finds that there is no genuine issue as to any material fact and that the Defendants' Motion for Summary Judgment should be and hereby is granted for the reasons set forth in the Opinion of the Court filed September 4, 1981, which is attached hereto,

marked Exhibit A, and made a part hereof by reference as though fully rewritten herein.

Accordingly, judgment is rendered against the Plaintiff and in favor of the Defendants with costs of this action chargeable to the Plaintiff. It is so Ordered.

/s/ JAMES W. JACKSON
Judge

OPINION OF THE COURT OF APPEALS OF LAKE COUNTY, OHIO

(Filed October 3, 1983)

No. 9-012

COURT OF APPEALS OF OHIO,
ELEVENTH DISTRICT, COUNTY OF LAKE

MICHAEL MILKOVICH, SR.,
Plaintiff-Appellant,

vs.

THE NEWS-HERALD, *et al.*,
Defendants-Appellees.

OPINION

The record shows that an altercation occurred during a wrestling match on February 8, 1974 between Maple Heights High School and Mentor High School which caused a violent disturbance injuring several people. The Ohio High School Athletic Association (OHSAA) conducted a hearing, which resulted in censoring plaintiff, placing the Maple Heights team on probation and declaring Maple Heights ineligible for further state wrestling tournament competition that year.

Subsequently, parents and members of the wrestling team filed an action in Franklin County Common Pleas Court, which held that they were denied due process and ordered the suspension imposed by OHSAA removed.

Defendant, The News-Herald, published a column written by Ted Diadiun on January 8, 1975. The article was

critical of plaintiff, who was head wrestling coach at Maple Heights, for his actions and conduct while coaching one of the team's matches immediately prior to the foregoing incidents. Whereupon, plaintiff filed a libel action, which was tried to a jury in early 1979. At the close of plaintiff's evidence, the trial court directed a verdict for defendants on the ground that the evidence failed to show by clear and convincing proof that the article was published with actual malice.

Plaintiff appealed and the appellate court reversed on the basis that reasonable minds could find actual malice. [See *Milkovich v. Lorain Journal Co.* (1979), 65 Ohio App. 2d 143.] Thereafter, on remand, the trial court granted defendants' motion for summary judgment.

Plaintiff now asserts seven assignments of error as follows:

"1. The Trial Court erred in granting Appellees' motion for summary judgment after this Court had mandated that the case be retried so that a jury could determine whether Appellees had acted with actual malice.

"2. The Trial Court erred in granting Appellees' motion for summary judgment because there are genuine issues of material fact in dispute between the parties.

"3. The Trial Court erred in granting Appellees' motion for summary judgment because appellees were not entitled to judgment as a matter of law.

"4. The Trial Court erred in holding that Michael Milkovich was a public figure and that he is required to show actual malice before recovering for damage to his reputation.

"5. The Trial Court erred in holding that the defamatory falsehoods published by Appellees about Michael Milkovich were constitutionally-protected opinions rather than assertions of fact or opinions stated without disclosing the underlying bases therefore.

"6. The Trial Court erred in holding that Michael Milkovich had not demonstrated, by clear and convincing evidence, that Appellees had acted with actual malice in publishing false and defamatory statements about him when the same evidence was before the Trial Court that this Court has already held to be sufficient.

"7. The Trial Court erred in granting Appellees' motion for summary judgment where Michael Milkovich presented evidence showing that Appellees had published false statements about him in violation of their duty, under Ohio law, to exercise reasonable care to avoid publishing such falsehoods and where Appellees denied having done so, thus creating a genuine issue of material fact."

As to plaintiff's first assignment of error, this court previously reversed the trial court's judgment and remanded the case for "further proceedings." Traditionally, "[b]y reversal, a judgment is made void, and the matters litigated in the case reversed, again become open for litigation between the same parties." *Hinton v. McNeil* (1832), 5 Ohio St. 509, 511. Hence, the trial court had the discretion to consider a motion for summary judgment as "further proceedings." Such proceedings could properly include a review of new issues not previously raised.

Therefore, plaintiff's first assignment of error is overruled.

Plaintiff's fourth and sixth assignments of error are interrelated and are considered together. It is well settled that newspaper articles concerning public figures or public officials, including false statements of fact, are not actionable unless published with actual malice. *New York Times v. Sullivan* (1964), 376 U.S. 254; *Curtis Publishing Co. v. Butts* (1967), 388 U.S. 130; *Dupler v. Mansfield Journal* (1980), 64 Ohio St. 2d 116. Actual malice is defined as knowledge that the statement is false or reckless disregard for the truth. *New York Times* at 279-280; *Dupler* at 119. Public figure is defined as one who, by reason of his achievements, secures public attention. *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 323.

The record shows that plaintiff is definitely a public figure. His outstanding record as a wrestling coach and leader in his profession is well documented in the transcript. Similar to *Butts, supra*, Milkovich has a list of impressive credentials, which conclusively demonstrates his prominence. Consequently, as a public figure, plaintiff was required to establish by clear and convincing evidence that the statements were published with actual malice, that is, with knowledge of their falsity or reckless disregard of the truth. *Dupler, supra*, at 119. Summary judgment is proper when the court finds there is no genuine issue of material fact concerning the existence of actual malice.

The "knowledge of falsity" for actual malice requires the publisher to have actually known the article was false when published. *Sullivan, supra*, at 279-280. A publication's falsity alone is insufficient to establish actual malice. In this case, there is no evidence of actual knowledge, and particularly no evidence of a clear and convincing quality.

The "reckless disregard of the truth" aspect of actual malice requires the publisher to have either a hig'ı degree

of awareness of the probability that a statement is false, or serious doubts of the truth thereof. The fact that the court previously found in plaintiff's favor does not make such finding a conclusive determination of truth. Consequently, this alone does not make defendant's assertion that plaintiff lied reach the level of actual malice.

The evidence in this case, when construed most strongly for plaintiff, does not show the article was published with actual malice as evidenced by a reckless disregard for the truth.

Thus, plaintiff's fourth and sixth assignments of error are overruled.

Plaintiff's fifth assignment of error is also not well taken. A statement of opinion encompasses a privilege which is not applicable to a statement of fact. The United States Supreme Court in *Gertz, supra*, at 339-340 stated:

> "• • • Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the ca eless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues. • • •"

This privilege respecting statements of opinion is a qualified one, giving rise to an action in libel only when the article does not disclose the facts upon which the opinion is based. *See, e.g., Orr. v. Argus-Press Co.* (6th Cir. 1978), 586 F.2d 1108, *cert. denied* (1979), 440 U.S. 960. Moreover, whether a publication constitutes an opinion in the constitutional sense is a question of law.

The trial court found as a matter of law the article in question is an editorial opinion. The trial court's rationale is set forth in its opinion as follows:

> "Traditionally, courts have placed a premium on free debate. Erroneous opinions are inevitable. But even the erroneous opinion is to be tolerated in order that self censorship not prevail over robust public debate.
>
> "After carefully examining the article in question, the Court is in disagreement with plaintiff's contention that it is a statement of fact and not one of opinion. Both the tone, the choice of language and the article's editorial format leave no room for doubt that Mr. Diadiun's purpose was to convey a heartfelt editorial, albeit highly emotional. Nonetheless, this article falls within the realm of opinion, and not within the scope of a factual news account.
>
> "Mr. Diadiun's article presents a social commentary recapitulating three separate incidents: a wrestling match fracas, a subsequent proceeding before OHSAA and a due process hearing in the Franklin County Court of Common Pleas. The column is replete with phraseology, expressing Mr. Diadiun's personal views. The article speaks of lessons to be learned, of the preeminent position of educators, of the latter's function as role models, of the susceptibility of young people and also of whether 'might makes right'. Indicative of the Court's finding that the article constitutes editorial comment is Diadiun's utilization of the following language: '[i]f you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up'; 'I was in the unique position of being the only non-involved party'; '[t]o anyone who was at the meet'; 'But unfortunately, . . . [they] apparently had their version of the incident polished', and finally 'Anyone who attended the meet . . . knows in his heart that [they] . . . lied.'
>
> "Plaintiffs next argue that even if the article is opinion, defendant's failure to disclose the facts upon which the column is based transforms it into a factual article, eliminating its privileged status. Plaintiff's statement of the law is accurate. However, the Court does not find that the facts support a finding that the author failed to fully disclose the basis upon which his opinions were formulated. *Accord, Pease v. Telegraph Publishing*, 7 Media Law Rptr. 1114, 1115-6 (New Hamp. 1981).
>
> "Mr. Diadiun states in the article that he attended and covered the wrestling match in question. He also was present at the OHSAA hearing. And while absent from the due process proceedings in Franklin County, he did obtain, first hand, a recounting for an observer by the name of Dr. Harold Meyer, who was also present at the OHSAA hearing."

The record supports the trial court's analysis. Moreover, the article, as an opinion, disclosed its underlying facts. The writer, as indicated above, referred to events and circumstances upon which he based his opinion. The article did not present a factual news account. Rather, it summarized the writer's ideas, opinions and conclusions derived collectively from a number of related events which were plainly referred to therein.

The article substantiates its nature and editorial purpose. It appears in the sports editorial column labeled "TD says". Further, it is presented by a highly opinion-

ated title, "Maple beat the law with the 'big lie'", which does not suggest a factual news account of a specific event, but instead presents the writer's personal opinion. Thus, the article is privileged as it constitutes a statement of opinion concerning publicly known matters and discloses the underlying facts which provide the basis for the opinions expressed in the article.

Therefore, plaintiff's fifth assignment of error is overruled.

Finally, plaintiff's second, third and seventh assignments of error are interrelated and are considered together. As applied to this case, Civ. R. 56(C) provides that summary judgment is proper when, after all the evidence is construed most strongly in favor of the plaintiff, reasonable minds can only conclude that the article in question is a constitutionally-protected opinion; that plaintiff is a public figure and that plaintiff has failed to raise a genuine issue of material fact to find actual malice under the applicable burden of proof.

After a complete review of the record, and construing the evidence most strongly for plaintiff, the court correctly determined that reasonable minds could only conclude the article qualified as a constitutionally-privileged opinion. Furthermore, the court found that plaintiff is a public figure and there is simply nothing in the record to the contrary. Consequently, as a public figure or a public official, he is required to present a genuine issue of material fact which would clearly and convincingly establish that the article was published with actual malice. *Dupler, supra.* The trial court correctly found that the record does not present such issue. Finally, the trial court correctly concluded that the article was a constitutionally-protected opinion. Therefore, the trial court properly granted summary judgment to defendants.

Accordingly, plaintiff's second, third and seventh assignments of error are overruled.

For the foregoing reasons, the judgment is affirmed.

Judgment affirmed.

/s/ ARCHER E. REILLY

REILLY, *J.*, of the Tenth Appellate District, sitting by assignment in the Eleventh Appellate District.

COOK, *P. J.*,
FORD, *J.*, Concur.

JUDGMENT ENTRY OF THE COURT OF APPEALS OF LAKE COUNTY, OHIO

(Filed October 3, 1983)

No. 9-012

IN THE COURT OF APPEALS
ELEVENTH DISTRICT
STATE OF OHIO, COUNTY OF LAKE

MICHAEL MILKOVICH, SR.,
Appellant.

vs.

THE NEWS-HERALD, *et al.*,
Appellees.

JUDGMENT ENTRY

This cause came on to be heard upon the Record in the Trial Court, and was briefed and argued by counsel for the parties.

Upon consideration whereof, this Court finds no error prejudicial to the appellant and, therefore, the judgment of the Trial Court is affirmed. Each Assignment of Error was reviewed by the Court and disposed of as set forth in this Court's Opinion, which is incorporated herein by reference.

It is ordered that the costs shall be taxed against the appellant.

This Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Trial Court to carry this judgment into execution. A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ ARCHER E. REILLY
Judge (Tenth Appellate District, By Assignment) For the Court

APPENDIX

OPINION OF THE SUPREME COURT OF THE STATE OF OHIO

(Decided December 31, 1984)

No. 84-1833

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

MICHAEL MILKOVICH, SR.,
Appellant,

vs.

THE NEWS HERALD, *et al.*,
Appellees.

15 Ohio St. 3d 292

Defamation—Libel—"Public figure" or "public official," construed—"Opinions" actionable, when.

APPEAL from the Court of Appeals for Lake County.

Plaintiff-appellant, Michael Milkovich, Sr., is the former head wrestling coach of Maple Heights High School in Cuyahoga County. On February 9, 1974, appellant's wrestling team had a meet with Mentor High School. A fight broke out involving spectators and team members from both squads after a Maple Heights wrestler was disqualified by the referee.

As a result of the altercation, the Ohio High School Athletic Association ("OHSAA") held hearings and issued

sanctions against the Maple Heights team, including a disqualification from the state tournament, a one-year probationary status, and a censuring of appellant.

Thereafter, concerned parents and involved wrestlers filed an action in the Court of Common Pleas of Franklin County challenging the OHSAA's sanctions on due process grounds. Although appellant was called as a witness to testify at this proceeding, he was not a party to the action. The trial court ruled that OHSAA violated due process in imposing the sanctions and ordered that the suspension imposed be removed. *Barrett v. Ohio High School Athletic Assn.* (Jan. 7, 1975), Franklin C.P. No. 74 Civ. 09-3390, unreported.

The day after the trial court's decision, defendant-appellee Theodore Diadiun, a sports writer for defendant-appellee The News-Herald in Willoughby, wrote and published a newspaper article entitled "Maple beat the law with the 'big lie.'" The article was continued to the inside of the paper where the headline read "• • • Diadiun says Maple told a lie." The article went on to allege, *inter alia*, that appellant and the former superintendent of the Maple Heights School District "• • • lied at the hearing after each having given his solemn oath to tell the truth." The record indicates that Diadiun did attend the wrestling match and OHSAA hearing, but not the Franklin County judicial proceedings.

Appellant commenced the instant defamation action in the Court of Common Pleas of Lake County against The News-Herald, its parent company Lorain Journal Co., and Diadiun. Appellant, in his original and amended complaints, alleged that the following passages of the Diadiun article were actionable and libelous:

"Maple beat the law with the 'big lie.'"

"• • • a lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.

"A lesson which, sadly, in view of the events of the past year, is well they learned early.

"It is simply this: If you get in a jam, lie your way out.

"If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.

"The teachers responsible were mainly head Maple wrestling coach, Mike Milkovich, and former superintendent of schools, H. Donald Scott."

"Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

"But they got away with it.

"Is this the kind of lesson we want our young people learning from their high school administrators and coaches?

"I think not."

Prior to trial, the trial court determined that appellant was a public figure, and as such, would be required to establish actual malice on appellees' part under *New York Times Co. v. Sullivan* (1964), 376 U.S. 254.

A jury trial was held, but at the close of appellant's case, the trial court directed a verdict in favor of all the appellees on the basis that appellant had failed to

establish, by clear and convincing evidence, that the article was written and published with actual malice.

Upon appeal, the court of appeals reversed and remanded, holding that a reasonable jury could have found that appellees acted with actual malice toward appellant. *Milkovich v. Lorain Journal Co.* (1979), 65 Ohio App. 2d 143 [19 O.O.3d 99]. This court overruled appellees' motion to certify the record (case No. 80-107), and the United States Supreme Court in *Lorain Journal Co. v. Milkovich* (1980), 449 U.S. 966, denied certiorari over the published dissent of Justice Brennan.

Upon remand, the appellees filed a motion for summary judgment contending that the alleged libel was protected because it amounted to an expression of opinion. The trial court agreed, and granted summary judgment in favor of appellees.

Upon appellant's appeal to the court of appeals, the trial court's decision was affirmed. The appellate court held that appellant was a public figure and had failed to prove that the alleged libel was done with actual malice. The court further held that the article was a constitutionally protected opinion.

The cause is now before this court upon the allowance of a motion to certify the record.

Mr. Brent L. English, for appellant.

Wickens, Herzer & Panza Co., L.P.A., Mr. David L. Herzer, Mr. Richard D. Panza, Mr. Richard A. Naegele and *Mr. John J. Hurley, Jr.*, for appellees.

Per Curiam. The matter presented for our review involves important First Amendment considerations which require us to weigh the important interests of an uninhibited press and the need for judicial redress of libelous utterances.

I

The first issue before this court is whether appellant Milkovich is a "public figure" or "public official" as a matter of law.

The appellees argue that appellant is precluded from raising the issue that he is not a public figure, because he failed to preserve the issue during the initial appellate process of the cause.

In rejecting this argument we find that upon a careful review of the record, appellant has not waived this issue, and therefore, the issue is properly presented before this court.

In determining the status of appellant with respect to defamation law, a review of the pertinent United States Supreme Court decisions in this area is in order.

In the seminal case of *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, the Supreme Court held that public officials could not recover for defamation absent proof by clear and convincing evidence that such defamation was undertaken with "actual malice." (Hereinafter referred to as "*N.Y. Times* standard.") Such a standard was similarly adopted by this court in *Dupler v. Mansfield Journal* (1980), 64 Ohio St. 2d 116 [18 O.O.3d 354].

Then, in *Rosenblatt v. Baer* (1966), 383 U.S. 75, the high court stated that the inquiry into whether one is a public official is necessarily a question of law for the trial judge to determine.

The Supreme Court extended the *N.Y. Times* standard to cover "public figures" in *Curtis Publishing Co. v. Butts* (1967), 388 U.S. 130. In that case, the court defined a public figure as one who commanded a substantial amount of public interest by his status alone, or one who had

thrust himself by purposeful activity into the vortex of an important public controversy. The court reasoned that public figures should be held to the more difficult *N.Y. Times* standard because public figures have sufficient access to the means of counterargument in order to expose the falsity of the defamation complained of. *Id.* at 155.

The court further extended the *N.Y. Times* standard in *Rosenbloom v. Metromedia, Inc.* (1971), 403 U.S. 29, to private individuals where the matter reported was of concern to the public. *Rosenbloom* was a plurality opinion, and marked the most comprehensive application of the *N.Y. Times* standard. However, the rule of law set forth in *Rosenbloom* was unable to command a majority vote of the justices, and revealed the disagreement within the court that, perhaps, the application of the *N.Y. Times* standard was in need of further refinement.

We believe that if *Rosenbloom* and *Butts* were the last statements made by the high court concerning the definition of a public figure or official, we would be compelled to agree with the courts below that Milkovich is a public figure, and that the *N.Y. Times* standard would be applicable to his claim for relief. Needless to say, the *Rosenbloom* extension of the *N.Y. Times* standard to private individuals was reexamined in *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 323, and the Supreme Court retreated from its prior holding. In *Gertz*, the high court acknowledged the necessity of maintaining the *N.Y. Times* standard with respect to public figures and officials in order to fortify First Amendment freedom and to prevent self-censorship by the media. However, the court stated that the need to avoid self-censorship by the media was not the only societal value at issue. *Id.* at 341. With respect to private individuals, the court held that a different standard must apply in order to protect the state's interest

in compensating injury to the reputation of private persons. Therefore, the *Gertz* court redefined the meaning of a public figure in the following manner:

"For the most part those who attain this status [as a public figure] have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.* at 345.

The court in *Gertz* also noted that a person can become a public figure for a limited range of issues by being drawn or voluntarily injecting himself into a particular public controversy. In holding that Gertz was not a public figure for the purposes of defamation law, the court stated that although Gertz was well known in some circles, he had achieved no general fame or notoriety in the community, and had no persuasive involvement in the affairs of society. *Id.* at 351-352.

Two years later, the high court had before it the case of *Time, Inc. v. Firestone* (1976), 424 U.S. 448. In *Firestone*, the court reiterated its holding in *Gertz* with respect to the definition of a public figure, and held that the plaintiff, Mrs. Firestone, was not a public figure under *Gertz*. In spite of the fact that Mrs. Firestone was prominent among the "400" of Palm Beach Society, that she had subscribed to a press clipping service which evidenced her frequent mention in the printed medium, and that she had held several press conferences during the course of her divorce proceedings (id. at 484-485 [dissenting opinion]), the court found that the *Gertz* definition of public figure status had not been satisfied. The court also stated

that Mrs. Firestone's divorce proceeding was not the type of "public controversy" envisioned in *Gertz*. *Id.* at 454.

More recently, the Supreme Court sustained the *Gertz* characterization of a public figure in *Hutchinson v. Proxmire* (1979), 443 U.S. 111, 134; and *Wolston v. Reader's Digest Assn., Inc.* (1979), 443 U.S. 157, 164.

Turning our attention to the matter at hand, the appellees herein contend that in view of the accomplishments and honors earned by Milkovich in the area of high school wrestling,[1] the lower courts properly designated

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1. The following comprises a list of achievements and distinctions which, appellees contend, relegate Milkovich to the status of a public figure:

"(a) National Coach of the Year Award, Portland, Oregon, 1977.

"(b) Received Congressional Record Citation.

"(c) National Council of High School Coaches Award.

"(d) Inducted into the National Helms Hall of Fame.

"(e) National Achievement Award for 100 victories without loss by 'Scholastic Wrestling News'.

"(f) Conducts wrestling clinics throughout the United States Sponsored by State Associations and Coaches Organizations.

"(g) Speaker at Coaches Associations throughout United States: South Carolina, Florida, New York, Indiana, all over the nation.

"(h) No other coach in United States ever close to his record.

"(i) Honored with citation from Ohio Senate.

"(j) Honored with citation from Ohio House of Representatives.

"(k) Charter member, Ohio Coaches Hall of Fame.

"(l) Received United States Wrestling Federation Award.

"(m) Honored and cited by Council of City of Cleveland.

"(n) Honored by City of Maple Heights: Mike Milkovich Day.

"(o) Past President, Ohio Coaches Association.

"(p) Conducts wrestling school at Baldwin-Wallace College.

(Continued on following page)

him as a public figure. Appellees submit, and the court of appeals agreed, that the *Butts* decision is quite similar to the case at bar in that both Butts and Milkovich attained pervasive notoriety in their respective communities as prominent sports personalities, and that, therefore, Milkovich must be held to be a public figure in the same manner as Butts.

We disagree, and find that such a determination by this court would require us to ignore the redefinition of the public figure status as enunciated in *Gertz* and its progeny. In applying the *Gertz* standard to the case *sub judice*, we hold that Milkovich is not a public figure as that term is utilized in First Amendment analysis. While appellant may be an individual recognized and admired in his community for his coaching achievements, he does not occupy a position of persuasive power and influence by virtue of those achievements. By the same token, appellant's position in his community does not put him at the forefront of public controversies where he would attempt to exert influence over the resolution of those controversies. While appellant did become involved in a controversy surrounding the events during and subsequent to his team's wrestling match with Mentor High School, appellant never thrust himself to the forefront of that controversy in order to influence its decision. Furthermore, it cannot be said

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Footnote continued—

"(q) Speaker at schools.

"(r) Teams have 265 wins against 25 losses.

"(s) Honored for winning four consecutive state titles.

"(t) Winner of ten (10) Ohio state team titles.

"(u) Placed team in top 3 of Ohio 22 out of 25 years.

"(v) Received Kent State University Hall of Fame Award.

"(w) Honored with gifts, proclamations, and awards on retirement." (Citations to record omitted.)

that appellant assumed the risks of public life through the advertisement of his wrestling clinics. If this were the case, then any widespread advertisement for purely business purposes could result in the classification of an individual as a public figure. Given the application of the public figure definition since *Gertz*, we find appellant's status to be akin to the status of the plaintiff in *Firestone*, *supra*, rather than the status of the athletic director in *Butts*, *supra*.

Likewise, we reject appellees' argument that appellant is also a "public official" by virtue of his employment as a public high school teacher and coach. The United States Supreme Court stated in *Rosenblatt*, *supra*, at 85:

"• • • It is clear, therefore, that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."

Our interpretation of *Rosenblatt* leads us to conclude that the facts of the instant case are insufficient to qualify appellant as a public official for the purposes of defamation law. While appellees place great reliance on the case of *Johnston v. Corinthian Television Corp.* (Okla. 1978), 583 P.2d 1101, where a grade school wrestling coach was held to be a public official, we find that a similar interpretation by this court would unduly exaggerate the "public official" designation beyond its original intendment. In any event, we are unpersuaded that the *Rosenblatt* definition of a public official was intended to encompass a person like appellant under the facts and circumstances contained in the instant cause.

Therefore, we hold that for the purposes of defamation law and analysis as set forth in *N.Y. Times Co.* and *Gertz*

and their progeny, the appellant herein is not a public figure or public official as a matter of law. On remand, the trial court is instructed to proceed under the rule of law pronounced in *Embers Supper Club, Inc. v. Scripps-Howard Broadcasting Co.* (1984), 9 Ohio St. 3d 22, rather than that rule of law set forth in *Dupler, supra.*

II

Having found appellant to be a private individual in the realm of First Amendment analysis, our focus turns to the issue of whether the alleged defamatory article expresses constitutionally protected opinion; or whether it contains an assertion of fact which, if false, is not protected by the First Amendment. The courts below held that the article in question expressed the author's "heartfelt" opinion, thus rendering it non-actionable as a matter of law.

The United States Supreme Court stated in *Gertz, supra,* at 339-340:

"We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. * * *"

Many courts have interpreted this statement as requiring absolute constitutional protection for statements of opinion in the context of the laws of libel. See, *e.g., Orr v. Argus Press Co.* (C.A. 6, 1978), 586 F. 2d 1108. This court intimated in *Yeager v. Local Union 20* (1983), 6 Ohio St. 3d 369, 372, albeit in the context of a labor dispute, that where language is used which is capable of different meanings, such language constitutes an expression of opinion, not fact, and is protected. Nevertheless, this court has not adopted any specific standard with which to guide courts in determining what constitutes an expression of opinion, and what constitutes an expression of fact.

Some courts have adopted a variation of a "truth or falsity" test in order to distinguish between assertions of fact and assertions of opinion. See, *e.g., Buckley v. Littell* (C.A. 2, 1976), 539 F. 2d 882, certiorari denied (1977), 429 U.S. 1062. Under this approach, the objectionable statements are evaluated to determine whether the statements are capable of being proven false empirically.

Other courts have analyzed the fact/opinion distinction by applying the standard of the "ordinary person"; i.e., whether an ordinary reader of the alleged libelous statements would understand the statements as an expression of the author's opinion, or as statements of existing facts. See, *e.g., Mashburn v. Collin* (La. 1977), 355 So. 2d 879.[2]

While we decline to establish a *per se* rule in determining what constitutes a protected opinion or a potentially redressable assertion of fact, our review of the instant cause leads us to conclude that the lower courts erred in holding that the statements in issue were nothing more than the writer's "heartfelt" opinion. We find that the statements in issue are factual assertions as a matter of law, and are not constitutionally protected as the opinions of the writer. Nothing in the article effectively precautions the reader that the author's statements are merely his considered opinions. The plain import of the author's assertions is that Milkovich, *inter alia,* committed the crime of perjury in a court of law.

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2. For a general exploration of the various tests courts have implemented in examining the fact/opinion dichotomy, see Note, The Fact-Opinion Distinction in First Amendment Libel Law: The Need for a Bright-Line Rule (1984), 72 Geo. L.J. 1817.

HOLMES, J., dissenting. In the first instance, it appears to me that the publication with which we are concerned here is an expression of an opinion by the reporter, and not an untruthful statement of fact. As such, the statement is not actionable under First Amendment protection. *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 323; *Hotchner v. Castillo-Puche* (C.A.2, 1977), 551 F. 2d 910; and *Orr v. Argus-Press Co.* (C.A.6, 1978), 586 F. 2d 1108.

An opinion can be libelous only if a defamed plaintiff establishes four very limited conditions: (1) the opinion article must imply the existence of facts unknown to the general reader; (2) these implied, unknown facts must not be disclosed in the article; (3) these implied, undisclosed facts must be false; and (4) these implied, undisclosed and false facts must be the basis for the opinions stated in the article. *Orr v. Argus-Press Co., supra; Hotchner v. Castillo-Puche, supra.* The privilege for opinion can be lost only if the article does not disclose the facts underlying the opinions. 3 Restatement of the Law 2d, Torts (1977) 170, Section 566.

In the case before us, the trial court carefully reviewed the subject article and then held that the article fully disclosed the facts upon which its opinions were formulated. In affirming the trial court's decision, the court of appeals held that "[t]he record supports the trial court's analysis. Moreover, the article, as an opinion, disclosed its underlying facts. The writer * * * referred to events and circumstances upon which he based his opinion."

The article plainly refers to at least three distinct but related events upon which the author's personal opinions and editorial conclusions were derived:

(1) The February 9, 1974 wrestling meet between Maple Heights High School and Mentor High School;

(2) the administrative hearings on the wrestling meet conducted by the Ohio High School Athletic Association; and

(3) the proceedings before, and the decision of, the Court of Common Pleas of Franklin County regarding the due process aspects of the OHSAA administrative hearings.

The author further states in the article that he attended, covered and reported upon the wrestling match in question and the administrative hearings before the OHSAA. The article also explains that the opinions expressed regarding appellant's testimony before the Court of Common Pleas of Franklin County were based upon the author's conversation with Dr. Harold Meyer, Commissioner of the OHSAA, who attended the court hearing. Thus, a reader was free to agree or disagree with Diadiun's expressed opinions based upon the facts clearly stated in the article.

Furthermore, it is my view that the lower courts must be affirmed under the facts presented here in that Milkovich could well be considered to be a public figure under the criteria set forth in the recent opinions of the United States Supreme Court. In *Curtis Publishing Co. v. Butts* (1967), 388 U.S. 130, the court held that a person's prominence in the sports world could make him a public figure based upon the facts presented in a given case. Similarly, the proof before the trier of the facts in this case established that Milkovich was a public figure within the area of the publication of appellee's newspaper column, and perhaps reasonably beyond such geographic area. By his own admission, Milkovich is one of America's outstanding coaches and a nationally acclaimed sports figure.

In reversing the appellate court on this issue, we are persuaded by the cogent rationale supplied by Judge Friendly in *Cianci v. New Times Publishing Co.* (C.A. 2, 1980), 639 F. 2d 54, at 64:

"It would be destructive of the law of libel if a writer could escape liability for accusations of crime simply by using, explicitly or implicitly, the words 'I think'."

Therefore, based upon the foregoing, we reverse the judgment of the court of appeals, and remand the cause to the trial court for further proceedings consistent with this opinion.

Judgment reversed and cause remanded.

CELEBREZZE, C.J., SWEENEY, C. BROWN and J. P. CELEBREZZE, JJ., concur.

W. BROWN, J., dissents.

LOCHER and HOLMES, JJ., dissent separately.

WILLIAM B. BROWN, J., dissenting. I respectfully dissent on the basis that the alleged defamatory article expresses a constitutionally-protected opinion and accordingly cannot be the basis of a defamation action.

There is a growing judicial recognition that pure statements of opinion are absolutely privileged from being the basis for a defamation suit. See, *e.g., Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 324. In *Orr v. Argus Press Co.* (C.A. 6, 1978), 586 F. 2d 1108, 1114, the *Gertz* principle regarding a statement of opinion was applied: "It is now established as a matter of constitutional law that a statement of opinion about matters which are publicly known is not defamatory." The underlying rationale is that even erroneous opinion is to be tolerated in order that self-censorship not prevail over robust public debate.

In the instant case, appellant was essentially accused in the article of perjury, *i.e.*, lying under oath. The great weight of authority holds that allegations concerning illegality are not absolutely protected by the First Amendment.

"While the Restatement (Second) of Torts posits an absolute privilege for opinions, it explicitly recognizes that an allegation of criminal behavior is properly the subject of a defamation action. Most courts have not faced the question of whether such accusations should be categorized as facts or opinions. They have acknowledged, nonetheless, either implicitly or explicitly, that such accusations are not absolutely protected under the first amendment and have only the more limited *New York Times* privilege reserved for statements not made in reckless disregard of the truth." Note, Fact and Opinion After *Gertz v. Robert Welch, Inc.*: The Evolution of a Privilege (1981), 34 Rutgers L. Rev. 81, 114-115.

In the instant case, the statements were not made in reckless disregard of the truth. The author disclosed the basis upon which his opinions were formulated. He stated he attended the wrestling match in question and was present at the OHSAA hearing. The writer also indicated he had a recounting of the due process proceedings held in Franklin County from Dr. Meyer, who had also been at the OHSAA hearing. Under these facts, I cannot find that the writer acted in reckless disregard of the truth. Resultantly, in my opinion, this editorial opinion may not form the basis of a defamation suit.

Having determined that the article consituted a constitutionally privileged opinion, it is unnecessary to consider the issue of whether appellant was a public figure.

His coaching record is unparalleled in Ohio and throughout the country, and he has been honored by civic groups, legislative bodies and numerous sports organizations.[3]

In accordance with the Supreme Court's requirements in *Butts, supra*, the trial court in the case *sub judice* properly ruled, in summary judgment proceedings, that Milkovich is a public figure. Appellant's attainments and prominence as a national sports figure, honored by sports, civic and legislative bodies, with coaching records seemingly unparalleled in Ohio and nationally, unquestionably establish him as a public figure.

In addition, Milkovich, by his own actions, has established himself as a "public figure" under the standards of *Gertz, supra*. In that case, the Supreme Court summarized the law regarding "public figure" status in libel cases by stating that, "[t]hose who, by reason of the notoriety of their achievement or the vigor and success with which they seek the public's attention, are properly classed as public figures * * *." *Id.* at 342.

Based on the foregoing, and construing all of the evidence most favorably in favor of Milkovich at the time of the motion for summary judgment, I conclude that the appellant failed to raise any genuine issue of material fact upon which a jury could find actual malice with any standard of convincing clarity, and therefore the trial court's granting of summary judgment was proper.

Accordingly, I would affirm the judgment of the court of appeals.

LOCHER, *J.*, concurs in the foregoing dissenting opinion.

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3. A list of such accomplishments is found in fn. 1 of the majority opinion.

DISSENT OF MR. JUSTICE BRENNAN IN THE DENIAL OF PETITIONERS' FIRST REQUEST FOR CERTIORARI

(Dated November 3, 1980)

No. 80-100

THE SUPREME COURT OF THE UNITED STATES

LORAIN JOURNAL CO., *et al.*,
Petitioners,

vs.

MICHAEL MILKOVICH, SR.,
Respondent.

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449 U.S. 966

No. 80-100. LORAIN JOURNAL Co. *et al. v.* MILKOVICH. Ct. App. Ohio, Lake County. Motions of Beacon Journal Publishing Co. et al. and Ohio Newspapers Association for leave to file briefs as *amici curiae* granted. Certiorari denied. JUSTICE STEWART would deny this petition for want of a final judgment. Reported below: 65 Ohio App. 2d 143, 416 N. E. 2d 662.

JUSTICE BRENNAN, dissenting.

This petition for certiorari raises an important question concerning limitations on the authority of trial courts to grant dismissals, summary judgments, or judgments notwithstanding the verdict[1] in favor of media defendants

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1. Although the decision below concerned directed verdicts, its holding would affect the courts' treatment of summary judgments and judgments notwithstanding the verdict as well. In each of these situations, the court is called upon to answer the same question: whether there is sufficient evidence for the jury to find actual malice under the applicable "clear and convincing evidence" burden of proof.

in libel actions, based on the qualified privilege outlined in *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964).

On January 8, 1975, the News-Herald of Willoughby, Ohio, published a column by sportswriter Ted Diadiun criticizing respondent Michael Milkovich, a wrestling coach at Maple Heights High School, who is treated as a "public figure" for purposes of this case. Headlined "Maple beat the law with the 'big lie'" the column accused Milkovich of lying about a fracas that occurred during one of his team's wrestling matches.

On February 9, 1974, the Maple High wrestling team, coached by Milkovich, faced a team from Mentor High School. A brawl involving both wrestlers and spectators erupted after a controversial ruling by a referee. Several wrestlers were injured. The Ohio High School Athletic Association (OHSAA) subsequently conducted a hearing into the occurrence, censured Milkovich for his conduct at the match, placed his team on probation for the school year, and declared the team ineligible to compete in the state wrestling tournament. Diadiun attended and reported on both the match and the hearing, at which Milkovich had defended his behavior. Thereafter, a group of parents and high school wrestlers filed suit in Franklin County Common Pleas Court, claiming that the OHSAA had denied the team due process. Milkovich, not a party to that lawsuit, appeared as a witness for the plaintiffs. On January 7, 1975, the court held that due process had been denied, and enjoined the team's suspension. *Barrett v. Ohio High School Athletic Assn.*, No. 74CV-09-3390.[2]

2. The court ruled that the wrestling team was denied its right to crossexamine witnesses and to call witnesses on its behalf. The court did not make any factual findings concerning the underlying occurrences, nor did it comment on those occurrences.

Diadiun did not attend the court hearing, review the transcript, or read the court's opinion, but he wrote a column about the decision based on his own recollection of the wrestling match and ensuing OHSAA hearing and on a description of the court proceeding given him by an OHSAA Commissioner. In the column, Diadiun stated that Milkovich and others had "misrepresented" the occurrences at the OHSAA hearing, and that Milkovich's testimony "had enough contradictions and obvious untruths so that the six board members were able to see through it." Diadiun went on to say, however, that at the later court hearing Milkovich and a fellow witness "apparently had their version of the incident polished and reconstructed, and the judge apparently believed them." Diadiun concluded that anyone who had attended the match "knows in his heart that Milkovich . . . lied at the hearing after. . . having given his solemn oath to tell the truth. But [he] got away with it."

Milkovich filed a libel action in state court against petitioners Diadiun, the News-Herald, and the latter's parent corporation. Petitioners moved for summary judgment. The court held that Milkovich is a public figure for purposes of the *New York Times* test,[3] but denied summary judgment. The action was then tried to a jury. After five days of trial, at the close of Milkovich's evidence, petitioners moved for a directed verdict. They argued that Milkovich had failed to proffer sufficient evidence from which the jury could conclude that Diadiun's column had been published with actual malice under the *New York Times* test. The court granted the motion for directed verdict, stating that the evidence, considered most strongly in favor of Milkovich, "fails to establish by clear

3. The ruling that Milkovich is a public figure is unchallenged.

and convincing proof that the article . . . was published with knowledge of its falsity or in reckless disregard of the truth."

Milkovich appealed to the State Court of Appeals, which reversed and remanded for trial. The court stated that Diadiun's column conflicted with the factual determination reached in the earlier Common Pleas Court injunctive action, and held that this conflict alone constituted sufficient evidence of actual malice to withstand petitioner's motion for directed verdict.[4] Petitioners appealed to the Ohio Supreme Court, and also sought review in the nature of certiorari. The Ohio Supreme Court dismissed the appeal as raising "no substantial constitutional question" and otherwise denied review. The court also denied petitioners' motion for rehearing.[5]

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4. The court stated:

"In the instant case, a court of law, based on the evidence before it, and having the right to determine where the truth lay, even though on a due process question, determined the truth in favor of the plaintiff and the wrestling team he coached. Thus, he had his day in court and was at that time at least, exonerated by the only recognized arbiter of the truth in our American judicial system, but thereafter was still called a liar for the testimony he allegedly gave during that trial. . . . It would appear that, though the press might be at liberty to criticize the judicial process and the results of a given case, unless and until the judgment of the court is overturned on appeal, the determination of what constitutes that truth has been made. Thus, any news article written either as fact as a news item, or as opinion, that is published knowing that it conflicts with a judicial determination of the truth, may, in our opinion, be regarded as a reckless disregard of the truth so as to constitute 'actual malice' so as to be actionable libel of a public person. Whether, in a given case, it constitutes a reckless disregard of the truth, is not, in our opinion, a question of law, but a question of fact based on the evidence before the court." 65 Ohio App. 2d 143, 146, 416 N. E. 2d 662, 666 (1979).

5. Although the appellate court below remanded the case for retrial, including a jury determination on the actual-malice issue, the decision was nonetheless a final judgment for purposes

(Continued on following page)

The import of the Ohio appellate court's holding is plainly that, even in the absence of proof of knowing falsehood or reckless disregard for the truth, a newspaper forfeits its right to a directed verdict, summary judgment, or judgment notwithstanding the verdict on the issue of actual malice if it has published a statement that conflicts, however tangentially, with a decision by a court. This holding is clearly contrary to the First Amendment and to the relevant precedents of this Court. I had supposed it was settled that newspapers are privileged to publish their views of the facts, so long as those views are not recklessly or knowingly false. It matters not that such views may conflict with those of a court, for the press is free to differ with judicial determinations. In the libel area, neither a court nor any other institution is the "recognized arbiter of the truth," as the court below asserted. See *Gertz v. Robert Welch, Inc.*, 418 U. S. 323, 339-340 (1974).[6]

One part of the "strategic protection" that decisions of this Court have extended to the press in the libel area is the insistence that a public figure can prevail "only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth." *Gertz v. Robert Welch, Inc., supra*, at 342; *New York Times Co. v. Sullivan*, 376

Footnote continued—

of 28 U. S. C. § 1257. A decision in favor of petitioners would terminate the litigation, while a failure to decide the question now would leave the press in Ohio "operating in the shadow of . . . a rule of law . . . the constitutionality of which is in serious doubt." *Cox Broadcasting Corp. v. Cohn*, 420 U. S. 469, 486 (1975); *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241, 246-247 (1974).

6. Indeed, at common law, a factual finding embodied in the judgment in another cause could not even be used as evidence of that fact in court. 5 J. Wigmore, Evidence § 1671a, pp. 806-807 (Chadbourn rev. 1974).

U. S., at 285-286. The court in a libel action has a responsibility to ensure that sufficient evidence of actual malice has been introduced to permit a jury finding under this exacting standard. This protection must not be withdrawn merely because the press account may have differed with the conclusions of a court, lest the "uninhibited, robust, and wide-open." *New York Times v. Sullivan, supra*, at 270, discussion of judicial proceedings be deterred. See *Richmond Newspapers, Inc. v. Virginia*, 448 U. S. 555 (1980).

The consequence of the erroneous ruling in this case is particularly apparent on the facts: petitioners were denied a directed verdict on the strength of a prior court opinion that did not even discuss, let alone decide, what had happened at the disrupted wrestling match or whether Milkovich had testified truthfully. The court had merely ruled that the Maple High School wrestling team was denied certain procedural safeguards required under due process. Thus, it is abundantly apparent that the state court's conclusion that Diadiun wrote this column "knowing that it conflicts with a judicial determination of the truth" is unpersuasive even on its own terms.

Because in my view the decision of the Ohio appellate court in this case seriously contravenes the principles of the First Amendment as interpreted by this Court, and threatens to chill the freedom of newspapers in Ohio to publish their view of the facts where they differ with the view of the courts, I dissent and would grant certiorari to review this important question of constitutional law.

JUDGMENT ENTRY OF THE SUPREME COURT OF THE STATE OF OHIO

(Dated December 31, 1984)

No. 83-1833

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

MICHAEL MILKOVICH SR.,
Appellant,

vs.

THE NEWS-HERALD *et al.*,
Appellees.

MANDATE

To the Honorable Court of Common Pleas Within and for the County of Lake, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals is reversed and cause remanded for the reasons set forth in the opinion rendered herein.

ORDER OF THE SUPREME COURT OF THE STATE OF OHIO DENYING PETITIONERS' MOTION FOR REHEARING

(Dated February 6, 1985)

Case No. 83-1833

THE SUPREME COURT OF OHIO
COLUMBUS

MICHAEL MILKOVICH, SR.,
Appellant,

vs.

NEWS HERALD *et al.*,
Appellees.

REHEARING

It is ordered by the court that rehearing in this case is denied.

Judgment Entry of the Court of Common Pleas, Lake County, Ohio Granting Defendants' Renewed Motions for Summary Judgment

(October 6, 1987)

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

MICHAEL MILKOVICH, SR., Plaintiff,	)	CASE NO. 75 CIV 0301
-vs-	)	JUDGMENT ENTRY
THE NEWS HERALD, et al. Defendants.	)	October 6, 1987

Defendants The Lorain Journal Company, aka The News Herald, and J. Theodore Diadiun's joint motion for summary judgment is hereby granted.

IT IS SO ORDERED.

/S/ James W. Jackson
Judge of the Court of Common Pleas

Copies:

Richard D. Panza, Esq.
Brent L. English, Esq.
John J. Hurley, Esq.

Judgment Entry of the Court of Appeals
Lake County, Ohio
(Filed February 6, 1989)

COURT OF APPEALS
ELEVENTH DISTRICT
LAKE COUNTY, OHIO

JUDGES

MICHAEL MILKOVICH, SR.,
Plaintiff-Appellant,

-vs-

THE NEWS-HERALD, et al.,
Defendents-Appellees.

HON. DONALD R. FORD, P.J.
HON. JUDITH A. CHRISTLEY, J.
HON. SAUL G. STILLMAN, J.,
Ret., Eighth Appellate Dist.
sitting by assignment for
HON. ROBERT E. COOK.

Case No. 13-009

OPINION

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas Case No. 75 CIV 0301

JUDGMENT: Affirmed.

ATTY. BRENT L. ENGLISH
140 Public Square
611 Park Building
Cleveland, OH 44114
(For Plaintiff-Appellant)

ATTY. RICHARD D. PANZA
1144 West Erie Avenue
Lorain, OH 44052-1496
(For Defendants-Appellees)

STILLMAN, J.

On February 9, 1974, Maple Heights High School had a wrestling meet with Mentor High School. Michael Milkovich, now retired, was then the head wrestling coach of Maple Heights. During the meet, a controversial call was made against Maple Heights. As a result, a fight broke out involving spectators and team members from both squads resulting from the disqualification of a Maple Heights wrestler. Several people were injured in the disturbance.

On February 28, 1974, the Ohio High School Athletic Association (OHSAA) held a hearing on the matter at which both H. Don Scott, then Superintendent of Maple Heights Public Schools, and Milkovich testified. Following the hearing, OHSAA placed the entire Maple Heights team on probation for one year and declared the team ineligible for the 1975 state tournament. OHSAA also censored Milkovich for his actions during this match.

Thereafter, several parents and affected wrestlers sued OHSAA in the Court of Common Pleas of Franklin County for a restraining order contending they were denied due process. Scott, Milkovich and Dr. Harold A. Meyer, the commissioner of OHSAA, all testified at this proceeding. The court reversed the probation and ineligibility orders on grounds of denial of due process.

The day after the trial court's decision, the News-Herald in Willoughby, Ohio published a column written by reporter J. Theodore Diadiun on its sports page. The column was titled, "Maple beat the law with the 'big lie,'" and included the words "TD Says" beneath the title. The carryover page was entitled "*** Diadiun says Maple told a lie."

The article alleged, *inter alia*, that Milkovich and Scott "*** lied at the hearing after each having given his solemn oath to tell the truth." The record indicates that Diadiun did attend the wrestling match and OHSAA's hearing, but was not present at the Franklin County judicial proceedings. However, the article stated that Diadiun had discussed the hearing with Dr. Meyer.

Both Milkovich and Scott commenced a defamation action in the Court of Common Pleas of Lake County against the News-Herald, its parent company, Lorain Journal Company, and Diadiun. Milkovich, in his original and amended complaints, alleged that the following passages of the Diadiun article were actionable and libelous.

> "Maple beat the law with the 'big lie'
>
> "***
>
> "*** a lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.
>
> "A lesson which, sadly, in view of the events of the past year, is well they learned early.
>
> "It is simply this: If you get in a jam, lie your way out.
>
> "If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.
>
> "The teachers responsible were mainly head Maple wrestling coach, Mike Milkovich, and former superintendent of schools, H. Donald Scott ***.
>
> "***
>
> "Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.
>
> "But they got away with it.
>
> "Is this the kind of lesson we want our young people learning from their high school administrators and coaches?
>
> "I think not."

Prior to trial, the trial court determined that the appellant was a public figure, and as such, would be required to prove "actual malice" on the part of the News-Herald, et al., under *New York Times Co.* v. *Sullivan* (1964), 376 U.S. 254.

A jury trial was held, but a directed verdict was entered against Milkovich. Upon appeal, the court of appeals reversed and remanded. The Ohio Supreme Court overruled the New-Herald's motion to certify the record and the United States Supreme Court denied certiorari.

Upon remand, the News-Herald filed a motion for summary judgment contending that the alleged libel was protected because it amounted to an expression of opinion. The trial court agreed and granted summary judgment in favor of the News-Herald, et al.

Upon a second appeal to the court of appeals, the trial court's decision was affirmed. On December 31, 1984, the Ohio Supreme Court overruled the appeals court. The Ohio Supreme Court held, *inter alia*, that the Diadiun article was not constitutionally protected material. The case was reversed and remanded.

While the Milkovich case was pending, H. Don Scott had also filed a suit in libel. The trial court dismissed the Scott suit on summary judgment. The Scott trial court found that the article was constitutionally protected opinion, that Scott was a "public official," and that he had failed to prove "actual malice." The court of appeals affirmed the judgment of the Scott trial court. On August 5, 1986, the Scott suit was before the Ohio Supreme Court on a motion to certify. The Scott suit was in conflict with *Milkovich* v. *News-Herald* (1984), 15 Ohio St. 3d 292. The Ohio Supreme Court affirmed the court of appeals. They held, *inter alia*, that the article in question was opinion.

On remand for the third time to the Court of Common Pleas of Lake County, Ohio, the News-Herald, et al., moved for summary judgment. Their motion claimed that the case of *Scott* v. *News-Herald* (1986), 25 Ohio St. 3d 243, established, for the purpose of this case, that the article in question was cloaked with an absolute constitutionally-based First

Amendment privilege. The News-Herald's motion for summary judgment had attached a memorandum filed January 20, 1987. The attached memorandum basically stated that the case of *Scott* v. *News-Herald, supra,* was now the law and should control in the instant cause. Nothing else was attached to the motion.

On January 30, 1987, a "supplemental memorandum in support of motion for summary judgment" was filed. Attached was an affidavit of Ted Diadiun which stated that a middle school in Maple Heights School District had been named "Milkovich Middle School" after the wrestling coach. On April 8, 1987, a "motion of defendants for summary judgment, instanter" was filed. Nothing was attached; however, the motion stated that it incorporated "the interrogatories and depositions filed with the court and all of the affidavits and exhibits annexed to defendant's prior Motions for Summary Judgment filed with the Court on November 8, 1976 and April 17, 1981." On July 15, 1987, a memorandum in opposition to summary judgment was filed. There were no attachments. A reply memorandum, with no attachments, was filed August 10, 1987.

The trial court granted the summary judgment motion for the News-Herald, et al. Milkovich has timely appealed the case to this court, listing four assignments of error:

> "1. The trial court erred in granting a summary judgment since the appellees are not protected by a blanket First Amendment privilege as the offending article contained assertions of fact and not mere opinions.
>
> "2. The law of the case doctrine operates to require the trial court to follow the mandate of the Supreme Court of Ohio in *Milkovich* v. *The News-Herald*, (sic) 15 Ohio St. 3d 292 (1984).
>
> "3. Summary judgment was inappropriate in this case because the existence of privilege depended on resolution of disputed factual contentions and thus could not be made as a matter of law by the court based on a summary judgment motion.

> "4. Assuming that appellees are not protected for a First Amendment-based privilege to defame, summary judgment should not have been granted because there are genuine issues of fact in dispute as to negligence and actual malice."

The assigned errors are without merit.

Milkovich contends that the trial court erred in granting summary judgment. He asserts four assignments of error, all of which relate to the trial court's granting of summary judgment. Milkovich's first contention is that the article in the News-Herald was not protected by the First Amendment because it contained assertions of fact and not opinion. His second contention is that the trial court should have followed the case of *Milkovich* v. *News-Herald* (1984), 15 Ohio St. 3d 292. His third contention is that there remains a geniune issue as to whether the statements were assertions of fact or opinion. His final contention is that there continues to be genuine issues of fact in dispute as to whether there was actual malice on the part of the News- Herald, et al.

Milkovich's four assignements of error are basically only one assignment of error, to-wit: The trial court erred in granting appellee's motion for summary judgment.

In *Temple* v. *Wean United, Inc.* (1977), 50 Ohio St. 2d 317, the Ohio Supreme Court, at page 327, stated:

> "Civ. R. 56(c) specifically provides that before summary judgment may be granted, it must be determined that: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party."

Civ. R. 56 establishes summary judgment as a procedural device designed to terminate litigation and to avoid a formal trial where there is nothing to try. *Norris* v. *Ohio Std. Oil Co.* (1982), 70 Ohio St. 2d 1. The

burden of showing that no genuine issue exists as to any material fact falls upon the party requesting a summary judgment. When a motion for summary judgment is made and supported, an adverse party must counter with affidavits or other evidentiary material provided for in Civ. R. 56(c) to create a genuine issue as to any material fact. *Harless* v. *Willis Day Warehousing Co.* (1978), 54 Ohio St. 2d 64. The inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion. *Williams* v. *First United Church of Christ* (1974), 37 Ohio St. 2d 150.

Milkovich's first three contentions can be consolidated into one. He is asserting that there remains a factual dispute as to whether the article is an assertion of fact or opinion. Milkovich further contends that this court should follow the reasoning as set forth in *Milkovich* v. *News-Herald*, *supra*.

In the instant cause, it has been decided, as a matter of law, that the article in question is protected opinion.

> "*** In *Milkovich* v. *News-Herald*, *supra*, this court recently dealt with the same article we examine today. ***[W]e now overrule the holding in *Milkovich* with respect to the characterization of the article. We find the article to be an opinion, protected by Section 11, Article I of the Ohio Constitution as a proper exercise of freedom of the press.
>
> "The federal constitution has been construed to protect published opinions ever since the United States Supreme Court's opinion in *Gertz* v. *Robert Welch, Inc.* (1974), 418 U.S. 323, ***" *Scott* v. *News-Herald*, *supra*, at 244.

Milkovich asserts that the trial court was bound to follow the mandate of the Supreme Court as set forth in *Milkovich* v. *News-Herald*, *supra*. A trial court does not have the discretion to disregard a mandate of a superior court *unless* there is an extraordinary circumstance *"such as an intervening decision by the Supreme Court."* (Emphasis added.) *Nolan* v. *Nolan* (1984), 11 Ohio St. 3d 1. Secondly, when there is a conflict between cases, the court of appeals is bound by the Supreme Court's last decision

on the question involved, regardless of its previous decision. *Mutual Life Ins. Co. of Baltimore* v. *Connell* (1931), 43 Ohio App. 415. See also, generally, 23 Ohio Jurisprudence 3d (1980) 150, Courts and Judges, Section 518.

In conclusion, it has been decided, as a matter of law, that the article in question was constitutionally protected opinion. The court of appeals, as a lower court, is bound by the Supreme Court's decision on the matter. As such, there was no genuine issue of material fact remaining nor was there any factual dispute as to whether the article was opinion or assertion of fact. Accordingly, the first, second and third assignments of error are without merit.

In his fourth assignment of error, Milkovich is contending that there is a "genuine issue of fact" in dispute as to negligence and actual malice. He asserts that the article and its assertions are not privileged and as such there remained a material issue of fact as to whether the News-Herald acted negligently or with "actual malice in publishing the article.

In the instant cause, counsel's contention is erroneous. The article which has been previously considered in *Scott* v. *News-Herald* (1986), 25 Ohio St. 3d 243, has already been found to be constitutionally protected opinion.

> "Expressions of opinion are generally accorded absolute immunity from liability under the First Amendment. *Trump* v. *Chicago Tribune Co.* (D.N.Y. 1985), 616 F. Supp. 1434, 1435; *Gertz* v. *Robert Welch, Inc.*, *supra*, at 339; *Chaves* v. *Johnson* (Va. 1985), 335 S.E. 2d 97, 102. ***" *Id.* at 250.

As a matter of law, the instant cause does not present any material issue of fact as to negligence or "actual malice." Diadiun's article is opinion and as such, the News-Herald and Diadiun are accorded absolute immunity from liability. The fourth assignment of error is without merit, and accordingly, we affirm the judgment of the trial court.

Judgment afirmed.

/S/ JUDGE SAUL G. STILLMAN,
Ret., sitting by assignment.

FORD, P.J., concurs with Concurring Opinion,
CHRISTLEY, J., concurs.

COURT OF APPEALS
ELEVENTH DISTRICT
LAKE COUNTY, OHIO

JUDGES
HON. DONALD R. FORD, P.J.
HON. JUDITH A. CHRISTLEY, J.,
HON. SAUL G. STILLMAN, J.,
Ret., Eighth Appellate Dist.,
sitting by assignment.

MICHAEL MILKOVICH, SR.,
Plaintiff-Appellant,

-vs-

THE NEWS-HERALD, et al.,
Defendants-Appellees.

CASE NO. 13-009

CONCURRING OPINION

FORD, P.J.,

Although I agree with the majority that the *Scott* case interdicted the law of *Milkovich* as it pertained to the issue of whether the subject article in question was in the nature of fact or opinion, this writer is not persuaded that *Scott* affected the conclusion by the *Milkovich* court that the appellant here was to be considered a private figure.

The appellee asserts that the holding of *Anderson* v. *Liberty Lobby, Inc.* (1986), 447 U.S. 242, should somehow apply to the present appeal. *Anderson, supra,* involved the nature of a trial court's inquiry in a summary judgment exercise where the *New York Times* "clear and convincing" evidence requirement applied. The court in *Anderson* held that:

> "[W]here the factual dispute concerns actual malice, clearly a material issue in a New York Times case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." *Id.* at 255-256.

However, in view of the Ohio State Supreme Court's ruling in *Lansdowne* v. *Beacon Journal Pub. Co.* (1987), 32 Ohio St. 3d 176, it would appear inferentially that the fact that an individual would be determined to be a private person rather than a public figure or official would not alter the requirements for a nonmoving party in a summary judgment exercise in a libel case.

The metamorphosis of libel in Ohio has insulated the concerns for the chilling effect by moving to equatorial splendor for the Fourth Estate. The effect of the *Scott* and *Lansdowne* decisions in Ohio is to have effectively muted this traditional cause of action.

While a free press is fundamental to a free and democratic society, the quest for a more sensible set of criteria to balance the dignity and privacy of the individual with that of First Amendment guarantees to insure the guardian character of the press is a quest that it is hoped will achieve a greater harmony and clarity in the future.

/S/ PRESIDING JUDGE DONALD R. FORD

Opinion of the Court of Appeals of Lake County, Ohio
(Filed February 6, 1989)

STATE OF OHIO
COUNTY OF LAKE

THE COURT OF APPEALS
ELEVENTH DISTRICT

MICHAEL MILKOVICH, SR.,
Plaintiff-Appellant,

-vs-

THE NEWS HERALD, et al.
Defendants-Appellees.

JUDGMENT ENTRY

CASE NO. 13-009

For the reasons stated in the Opinion of this Court, each assignment of error is overruled, and it is the judgment and order of this Court that the judgment of the trial court is affirmed.

/S/ JUDGE SAUL G. STILLMAN,
Ret., sitting by assignment.

FOR THE COURT

FORD, P.J., concurs with Concurring Opinion,
CHRISTLEY, J., concurs.

Opinion of the Supreme Court of Ohio in H. Don Scott v. The News Herald, 25 Ohio St. 3rd 243 (1986)

O.Jur 3d Defamation §§ 5, 10, 16, 41, 83, 85.

1. The totality of the circumstances must be examined to determine whether a published statement is constitutionally protected opinion. (*Milkovich* v. *News-Herald* [1984], 15 Ohio St. 3d 292, overruled.)
2. A public school superintendent is a public official for purposes of defamation law.

(No. 84-274—Decided August 6, 1986.)

APPEAL from the Court of Appeals for Lake County.

This appeal arises from the circumstances surrounding an interscholastic wrestling match and subsequent events resulting therefrom. In early February 1974, a wrestling match was held between the host, Maple Heights High School, and Mentor High School. H. Don Scott, appellant, attended the match in his capacity as then-Superintendent of Maple Heights Public Schools. During the match, a controversial call was made against the host team, and a fracas ensued which involved the crowd and both teams. Several people were injured as a result of this disturbance.

On February 28, 1974, the Ohio High School Athletic Association ("OHSAA") held a hearing on the matter, at which both appellant and Michael Milkovich, Sr., the Maple Heights head coach, testified. Following the hearing, OHSAA placed the entire Maple Heights team on probation for one year, and rendered the team ineligible for the 1975 state tournament. OHSAA also censored Milkovich for his actions during the match.

Thereafter, several parents and affected wrestlers sued OHSAA in the Court of Common Pleas of Franklin County for a restraining order, contending that they were denied due process. Appellant and Milkovich testified at this proceeding, as did Dr. Harold A. Meyer, the Commissioner of OHSAA. The court reversed the probation and ineligibility orders on grounds of denial of due process.

On the day following the court's order, appellee-the News-Herald published a column written by appellee-reporter J. Theodore Diadiun on its sports page.[1] The column was entitled "Maple beat the law with the 'big lie,' " and included the words "TD Says" beneath the title. The carryover page was entitled ". . .Diadiun says Maple told a lie." The article alleged, *inter alia*, that appellant and Milkovich misrepresented the events

[1] See Appendix, *infra*, at 277-278.

which led to the OHSAA sanctions in an attempt to shift the blame to the Mentor team. The writer stated in the article that he had attended the match and the OHSAA hearing, and had discussed the court proceeding with Meyer. The article stated, near the end:

"Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth."

Milkovich and appellant each filed a suit in libel, naming appellees and the Lorain County Journal, appellee and parent company of the News-Herald, as defendants. The suits were tried separately, with similar outcomes. A directed verdict was entered against Milkovich, while the *Scott* suit was dismissed on summary judgment. Both courts found, *inter alia*, that the article was constitutionally protected opinion. The *Scott* trial court further found that appellant was a "public official" for defamation law purposes, and had failed to prove "actual malice" as required by *New York Times Co.* v. *Sullivan* (1964), 376 U.S. 254, and its progeny.

The court of appeals affirmed the judgment of the *Scott* trial court.

On December 31, 1984, this court decided the companion case of *Milkovich* v. *News-Herald* (1984), 15 Ohio St. 3d 292, which held, *inter alia*, that the Diadiun article was not constitutionally protected opinion.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Brent L. English, for appellant.

Wickens, Herzer & Panza Co., L.P.A., David L. Herzer, Richard D. Panza, Richard A. Naegele and *John J. Hurley, Jr.*, for appellees.

LOCHER, J. The general issue presented in this appeal is whether summary judgment was properly granted against appellant who avers he was defamed by appellees' column. Because we hold, as a matter of law, that the article in question was opinion, we find for appellees and affirm the court of appeals.

I

This case requires us to reformulate the test and standard in the context of published comment alleged to be defamatory. In *Milkovich* v. *News-Herald*, *supra*, this court recently dealt with the same article we examine today. For reasons to be expressed herein, we now overrule the holding in *Milkovich* with respect to the characterization of the article. We find the article to be an opinion, protected by Section 11, Article I of the Ohio Constitution as a proper exercise of freedom of the press.

The federal Constitution has been construed to protect published opinions ever since the United States Supreme Court's opinion in *Gertz* v. *Robert Welch, Inc.* (1974), 418 U.S. 323. The court stated in *Gertz* at 339-340:

"We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. * * *"

Federal and state courts alike have consistently adhered to the proposition that the free speech and press guarantees protect published opinions. See, *e.g.*, *Orr* v. *Argus-Press Co.* (C.A. 6, 1978), 586 F. 2d 1108; *Meyers* v. *Boston Magazine Co.* (1980), 380 Mass. 336, 403 N.E. 2d 376. Our democratic society is founded upon the freedom to voice objections concerning the status quo, and is dependent upon the interplay of conflicting viewpoints to improve itself and our justice system. See *Orr* v. *Argus-Press Co.*, *supra*, at 1117. The United States Supreme Court has been guided by the "* * * profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open * * *." *New York Times Co.* v. *Sullivan*, *supra*, at 270. The intent is to avoid self-censorship, whereby overbroad defamation standards result in the stifling of important non-defamatory material. *Gertz*, *supra*, at 340. These ideals are not only an integral part of First Amendment freedoms under the federal Constitution but are independently reinforced in Section 11, Article I of the Ohio Constitution which reads in pertinent part:

"Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press."

With these principles in mind we will now review appellant's propositions of law with particularity.

II

Appellant presents three propositions of law. The first states that "[t]he superintendent of public schools in a local school district in Ohio is not a public official for the purposes of the law of defamation where he is defamed in an article that does not relate to the performance of his official duties and because the position he holds is not such that he has, or appears to the public to have, substantial responsibility for the affairs of government."

In response to this proposition we reiterate the United States Supreme Court's statement in *Rosenblatt* v. *Baer* (1966), 383 U.S. 75, 86:

"* * * Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, both elements we identified in *New York Times* are present and the *New York Times* malice standards apply."

While distinctions between public figures, public officials, and private figures can be nebulous and difficult to apply, see, *e.g.*, Elder, Defamation, Public Officialdom and the *Rosenblatt* v. *Baer* Criteria—A Proposal for

Revivification: Two Décades After *New York Times Co.* v. *Sullivan* (1984), 33 Buffalo L. Rev. 579, the distinction is extremely important. See *New York Times Co., supra; Dupler* v. *Mansfield Journal* (1980), 64 Ohio St. 2d 116 [18 O.O.3d 354].

The rationale underlying the heightened standard of proof for public officials and public figures is that our society encourages uninhibited debate on the performance of public officials and on all public issues. *New York Times Co., supra; Curtis Publishing Co.* v. *Butts* (1967), 388 U.S. 130. Misstatements and falsehoods are inevitable in any democratic scheme of freedom of expression and debate. Any threat of liability, with regard to the expression of unpopular statements, may result in a "chilling" effect with devastating consequences to a democratic society. Private parties are not made subject to a high standard simply because they do not have the same opportunity to rebut damaging allegations as do those in the public realm.

As superintendent of a municipal public school system, appellant falls within the *Rosenblatt* guidelines. R.C. 3319.01 details the duties of a public school superintendent and provides that "[t]he superintendent of a [city] school district shall be the executive officer for the [school] board. * * *" Clearly, the head of a city school district has substantial responsibilities in the operation of the system. Moreover, the Maple Heights public has a substantial interest in the qualifications and performance of the person appointed as its superintendent.

Because the newspaper in which the alleged libelous statements were contained is of a local circulation, a finding of public official status is particularly strengthened. Controversial actions of a public school superintendent constitute major news in the local paper. A contrary finding would stifle public debate about important local issues. We are therefore compelled to reject as meritless any argument that suggests appellant is merely a "small fish in a big pond" when a local paper is the publishing medium. See *Rosenblatt* v. *Baer, supra,* at 83 ("The subject matter may have been only of local interest, but at least here, where publication was addressed primarily to the interested community, that fact is constitutionally irrelevant.").

Appellant further argues that the defamation did not relate to his official conduct as school superintendent. This view, however, is inapposite to the entire basis for Diadiun's article:

"When a person takes on a job in a school, whether it be as a teacher, coach, administrator or even maintenance worker, it is well to remember that his primary job is that of educator."

It was precisely because both Milkovich and Scott were authority figures—individuals with substantial impact on their community—that the article was ostensibly written. Diadiun had seen and heard appellant's activities at the wrestling match and the OHSAA hearing. Thus, the averred defamatory remarks arose from events where appellant was acting in an

official capacity as a school superintendent and within the ambit of his responsibilities. Appellant's prior activities and actions while in an official capacity were inextricably bound, in Diadiun's view, to the legal hearing which was the source of his averred perjury.[3] See *Johnston* v. *Corinthian Television Corp.* (Okla. 1978), 583 P. 2d 1101; *Cone* v. *Phipps Broadcasting Stations* (D. Ga. 1979), 5 Media L. Rep. (BNA) 1972; *Grayson* v. *Curtis Publishing* (1967), 72 Wash. 2d 999, 436 P. 2d 756; *Besarich* v. *Rodeghero* (1974), 24 Ill. App. 3d 889, 321 N.E.2d 739, 742; *Reaves* v. *Foster* (Miss. 1967), 200 So.2d 453. In short, appellant's testimony at the legal hearing was related to his official responsibilities at the wrestling match and OHSAA hearing.

In Justice Brennan's dissent, joined by Justice Marshall, to the United States Supreme Court's denial of certiorari in *Lorain Journal Co.* v. *Milkovich* (1985), ___ U.S. ___, 88 L. Ed. 2d 305, several concerns relevant to our present discussion were raised. First, " 'public school teachers may be regarded as performing a task "that goes to the heart of representative government." ' *Ambach* v. *Norwick,* 441 U.S. 68, 75-76 * * * (1979) (quoting *Sugarman* v. *Dougall,* 413 U.S. 634, 647 * * * (1973))." *Id.* at 309. Justice Brennan reiterated the belief at the core of today's decision that the public school teacher exerts a substantial role in shaping a community through his or her impact on the students both as role model and educator. See, also, *San Antonio Independent School Dist.* v. *Rodriguez* (1973), 411 U.S. 1, 29-30; *Wisconsin* v. *Yoder* (1972), 406 U.S. 205, 213; *Brown* v. *Board of Education* (1954), 347 U.S. 483, 493 [53 O.O. 326].

Second, Justice Brennan correctly adduced at 313-314 that "* * * [a] large fight between the students of two rival schools quite legitimately raises serious concerns for the entire community, particularly when, as here, it results in injury to students. * * * To say that Milkovich nevertheless was not a public figure for purposes of discussion about the controversy is simply nonsense." These two points are equally applicable to H. Don Scott in his capacity as superintendent of public schools and therefore ultimately responsible for Milkovich's behavior and the events which transpired at the wrestling match.

Based upon these concerns we cannot, with reflection, be content to rest on the standards related in *Milkovich* v. *News-Herald, supra.* Accord-

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[3] Appellant's retired status at the time of the legal hearing is thus not germane because the averred defamatory remarks were made in the course of actions arising from official conduct that were, most importantly, matters of import to the community's legitimate interest in a public official's performance of public responsibilities. Justice Brennan in his majority opinion in *Rosenblatt* reiterated the "strong interest in debate on public issues, and * * * a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues. Criticism of government is at the very center of the constitutionally protected area of free discussion." *Id.* at 85. It is similarly our view, under Ohio's Constitution, that the subsequent retirement of an individual does not diminish his or her status with respect to the discussion and debate of issues related to a prior status or position.

ingly, we overrule *Milkovich* in its restrictive view of public officials and hold a public school superintendent is a public official for purposes of defamation law.

Because appellant is a public official we now turn to the ramifications of this status upon his cause.

III

New York Times Co. v. *Sullivan, supra,* placed a stricter burden on a defamation plaintiff who is a public official, and required him or her to prove that false statements were made with "actual malice." Actual malice was defined as publishing a statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279, 280. This court has followed the stricter *New York Times Co.* standard, stating in *Dupler, supra,* at 119:

"This concept of actual malice has been further refined by subsequent decisions of the United States Supreme Court. Actual malice may not be inferred from evidence of personal spite, ill-will or intention to injure on the part of the writer. *Beckley Newspapers Corp.* v. *Hanks* (1967), 389 U.S. 81, 82; *Rosenblatt* v. *Baer* (1966), 383 U.S. 75, 84. Rather, the focus of [an actual malice] inquiry is on defendant's attitude toward the truth or falsity of the publication, *Herbert* v. *Lando* (1979), 441 U.S. 153, 160; and a public official may recover only upon clear and convincing proof of actual malice. *Gertz* v. *Robert Welch, Inc.* (1974), 418 U.S. 323, 342; *New York Times, supra,* at pages 285-286. There must be a showing that false statements were made with a 'high degree of awareness of their probable falsity * * *.' *Garrison* v. *Louisiana* (1964), 379 U.S. 64, 74.

"Since reckless disregard is not measured by lack of reasonable belief or of ordinary care, even evidence of negligence in failing to investigate the facts is insufficient to establish actual malice. Rather, since 'erroneous statement is inevitable in free debate, and * * * must be protected if the freedoms of expression are to have the "breathing space" that they "need * * * to survive," * * *' (*New York Times, supra,* at pages 271-72), '[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.' *St. Amant* v. *Thompson* (1968), 390 U.S. 727, 731."

We see no reason to now abandon this heightened burden of proof for public officials.

IV

Appellant's second proposition of law is partially predicated upon the assumption that he is a private citizen for defamation purposes and must only meet the ordinary negligence standard set forth in *Embers Supper Club, Inc.* v. *Scripps-Howard Broadcasting Co.* (1984), 9 Ohio St. 3d 22. Accordingly, appellant argues that a summary judgment rendered on the more stringent criteria of actual malice based upon public official status is inappropriate. Because of our resolution of this issue against appellant,

this proposition must fail. The question of *Embers'* continued validity is an issue that must await another day because that issue is not yet squarely before this court.

The record herein, however, supports the determination of the trial court that actual malice could not be established. No evidence was produced which would prove "clearly and convincingly" that appellees made a false statement with a high degree of awareness of probable falsity. To the contrary, as we will discuss in some detail with respect to appellant's final argument, the evidence showed that Diadiun believed his position to be correct, based on his observations and discussions concerning the actions of appellant.

V

The third and final proposition of law states: "Assertions that an individual lied under oath are not constitutionally privileged expressions of opinion but are instead actionable assertions of fact which are defamatory per se." Appellant posits that this court is bound by *stare decisis* to accept our prior conclusion in *Milkovich* that the allegedly defamatory statements were presented as "fact" and not opinion. We disagree.

A

In *Milkovich* a majority of this court at that time made the *ex cathedra* statement at 298-299:

"* * * We find that the statements in issue are factual assertions as a matter of law, and are not constitutionally protected as the opinions of the writer. Nothing in the article effectively precautions the reader that the author's statements are merely his considered opinions. The plain import of the author's assertions is that Milkovich, *inter alia,* committed the crime of perjury in a court of law."

It is implicit in the doctrine of *stare decisis* that some principle be established that the public may rely upon with the understanding it will not lightly be overturned. The underlying rationale for *stare decisis* is the importance of constancy and consistency in law. In the absence of consistency and constancy the value of law in society is diminished. We are therefore institutionally bound to uphold our prior decisions where time has vindicated the logic utilized to render the holding. See, *e.g., Hall* v. *Rosen* (1977), 50 Ohio St. 2d 135, 138 [4 O.O.3d 336].

In *Milkovich,* no test was offered and no analysis was given for reaching the conclusion that the article was fact and not opinion. No rule was articulated to support the majority position. Application of *stare decisis* to such a decision is therefore inappropriate in our view and would only engender continued confusion as to what properly constitutes opinion or fact. See *Leavitt* v. *Morrow* (1856), 6 Ohio St. 71, 78 ("* * * A legal principle [precedent], to be well settled, must be founded on *sound reason,* and tend to the purposes of justice. * * * Otherwise, it could never be said

that law is the *perfection of reason*, and that it is the *reason* and *justice* of the law which give to it its *vitality*. * * *"). (Emphasis *sic.*)

Expressions of opinion are generally accorded absolute immunity from liability under the First Amendment. *Trump* v. *Chicago Tribune Co.* (D. N.Y. 1985), 616 F. Supp. 1434, 1435; *Gertz* v. *Robert Welch, Inc., supra*, at 339; *Chaves* v. *Johnson* (Va. 1985), 335 S.E. 2d 97, 102. The determination of whether an averred defamatory statement constitutes opinion or fact is a question of law, properly within our purview today. *Ollman* v. *Evans* (C.A. D.C. 1984), 750 F.2d 970, 978; *Rinsley* v. *Brandt* (C.A. 10, 1983), 700 F.2d 1304, 1309; *Lewis* v. *Time, Inc.* (C.A. 9, 1983), 710 F.2d 549, 553; *Slawik* v. *News-Journal Co.* (Del. 1981), 428 A.2d 15, 17.

In establishing an analytical framework to separate fact from opinion, a number of possibilities are open to us. For example, the federal Ninth Circuit has promulgated a three-part test which holds those statements which "* * * convey pertinent information to the public about a matter of public interest, * * * are made in the course of a public debate or similar circumstances, and * * * are phrased in cautionary language" are opinion. *Murray* v. *Bailey* (N.D. Cal. 1985), 613 F.Supp. 1276, 1282; *Information Control Corp.* v. *Genesis One Computer Corp.* (C.A. 9, 1980), 611 F.2d 781. Another example includes the Restatement of the Law 2d, Torts view, and still others are subjective judgment calls such as *Milkovich, supra.*

After careful consideration of the various standards used to distinguish opinion from fact, it is our holding that a totality of circumstances test be adopted. This test, however, can only be used as a compass to show general direction and not a map to set rigid boundaries.

Consideration of the totality of circumstances to ascertain whether a statement is opinion or fact involves at least four factors. First is the specific language used, second is whether the statement is verifiable, third is the general context of the statement and fourth is the broader context in which the statement appeared. See, generally, *Ollman* v. *Evans, supra*, at 979; *Janklow* v. *Newsweek, Inc.* (C.A. 8, 1985), 759 F.2d 644, 649.

B

Our preliminary concern is with the common meaning of the allegedly defamatory statement. Although specific allegations of criminal conduct—"a charge which could reasonably be understood as imputing specific criminal or other wrongful acts" — have been found potentially actionable, *Cianci* v. *New Times Publishing Co.* (C.A. 2, 1980), 639 F. 2d 54, 64 (plaintiff alleged to be a rapist); *Lauderback* v. *American Broadcasting Companies, Inc.* (C.A. 8, 1984), 741 F.2d 193 (plaintiff alleged to be under investigation for insurance fraud), the distinction is not always easily made. *Lewis* v. *Time* (C.A. 9, 1983), 710 F.2d 549 (reader might draw inference plaintiff's malpractice actions would lead to disbarment); *Natl. Assn. of Letter Carriers* v. *Austin* (1974), 418 U.S. 264 (no implication of criminal conduct by use of the term "traitor" in defining a "scab"); *Greenbelt*

Cooperative Publishing Assn., Inc. v. *Bresler* (1970), 398 U.S. 6 (term "blackmail" not understood in context to be criminal conduct).

Turning to the present circumstances, the crux of appellant's argument is that he was accused of the crime of perjury. The operative language averred to be actionable is listed in appellant's complaint and amended complaint as follows:

"Maple beat the law with the 'big lie.' "

"* * * [A] lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.

"A lesson which, sadly, in view of the events of the past year, is well they learned early.

"**It is simply this: If you get in a jam, lie your way out.**

"If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.

"The teachers responsible were mainly head Maple wrestling coach, Mike Milkovich and former superintendent of schools H. Donald Scott.

"* * *

"Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

"But they got away with it.

"Is that the kind of lesson we want our young people learning from their high school administrators and coaches?

"I think not."

Based upon this language it should be recognized that there is no express statement that "H. Donald Scott committed perjury." Rather, the clear impact in some nine sentences and a caption is that appellant "lied at the hearing after * * * having given his solemn oath to tell the truth." Based solely on the specific language, as such language is commonly understood, there is little question that were we to consider the statement without further analysis appellant would have stated a valid cause of action. This is, however, only the beginning of our inquiry.

C

Our second concern is with whether the statement is verifiable. See, *e.g., Bose Corp.* v. *Consumers Union of United States, Inc.* (1984), 466 U.S. 485; *Buckley* v. *Littell* (C.A. 2, 1976), 539 F. 2d 882. The Second Circuit, in *Hotchner* v. *Castillo-Puche* (C.A. 2, 1977), 551 F.2d 910, 913, expanded on this problem in stating, "* * * [I]f an author represents that he has private, first-hand knowledge which substantiates the opinions he expresses, the expression of opinion becomes as damaging as an assertion of fact." Thus, where the "* * * statement lacks a plausible method of

verification, a reasonable reader will not believe that the statement has specific factual content." *Ollman* v. *Evans, supra*, at 979.

Analysis of the underlying verifiability of Diadiun's article also supports appellant's allegations. Whether or not H. Don Scott did indeed perjure himself is certainly verifiable by a perjury action with evidence adduced from the transcripts and witnesses present at the hearing. Unlike a subjective assertion the averred defamatory language is an articulation of an objectively verifiable event.

D

Our third concern involves an analysis of the larger objective and subjective context of the statement. Objective cautionary terms, or "language of apparency" places a reader on notice that what is being read is the opinion of the writer. Terms such as "in my opinion" or "I think" are highly suggestive of opinion but are not dispositive, particularly in view of the potential for abuse. We are mindful of Judge Friendly's observation that one should not "escape liability for accusations of crime simply by using, explicitly or implicitly, the words 'I think.'" *Cianci* v. *New Times Publishing Co., supra*, at 64. Accordingly, we are not persuaded that a bright-line rule of labeling a piece of writing "opinion" can be a dispositive method of avoiding judicial scrutiny. Such labeling does, however, strongly militate in favor of the statement as opinion.

Examining the article in its larger context, the first thing one notes is the large caption "TD Says" which would indicate to even the most gullible reader that the article was, in fact, opinion. This position is borne out by the second headline on the continuation of the article which states: "... *Diadiun says* Maple told a lie" (emphasis added). Parenthetically, we wonder at the majority's assertion in *Milkovich, supra*, at 299, that "• • • [n]othing in the article effectively precautions the reader that the author's statements are merely his considered opinions."

The language surrounding the averred defamatory remarks is also noteworthy. Although the objective language of apparency is confined to the two headlines noted above, the author takes some care in setting forth the subjective basis behind the article as the impetus to its creation. For example, Diadiun states: "When a person takes on a job in a school, whether it be as a teacher, coach, administrator or even maintenance worker, it is well to remember that his primary job is that of educator." The article goes on to reinforce this concern that those in positions of authority, at any level, also occupy positions of responsibility requiring candor should that authority be called into question. The issue, in context, was not the statement that there was a legal hearing and Milkovich and Scott lied. Rather, based upon Diadiun's having witnessed the original altercation and OHSAA hearing, it was his view that any position represented by Milkovich and Scott less than a full admission of culpability was, in his view, a lie.

A troubling addition to the article, however, was the quote attributed

to Dr. Harold Meyer, commissioner of OHSAA who attended the legal hearing, which stated, " 'I can say that some of the stories told to the judge sounded pretty darned unfamiliar' • • •. 'It certainly sounded different from what they told us.' " There is some question as to whether Meyer ever made such a statement and evidence was adduced by appellant to indicate no such statement was made. This concern, accepting appellant's view of the matter, is mitigated largely because Diadiun clearly did not attend the legal hearing and his article was really based upon the two events he personally witnessed. Diadiun further admits, at the beginning of the article, that the legal hearing involved "• • • whether Maple was denied due process by the OHSAA, the basis of the temporary injunction." Although we cannot necessarily expect the average reader to recognize that a due process hearing might not, and probably would not, involve any questions relating to specific prior conduct beyond the technical OHSAA procedures utilized in the OHSAA hearing, the implicit caveat is still present and is a factor to be considered.

A review of the context of the statements in question demonstrates that Diadiun is not making an attempt to be impartial and no secret is made of his bias. The strongest statement made in the article, "Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, *knows in his heart* that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth" (emphasis added), further indicates that the question of whether or not a lie was actually made is ultimately a subjective determination. While Diadiun's mind is certainly made up, the average reader viewing the words in their internal context would be hard pressed to accept Diadiun's statements as an impartial reporting of perjury.

Our fourth concern is with the broader context of the allegedly defamatory remarks. It has been remarked that "• • • [d]ifferent types of writing have • • • widely varying social conventions which signal to the reader the likelihood of a statement's being either fact or opinion." *Ollman, supra*, at 979, citing *Natl. Assn. of Letter Carriers, supra*, at 286. To evaluate an article's broader context we must examine the type of article and its placement in the newspaper and how those factors would influence the reader's viewpoint on the question of fact or opinion.

It is important to recognize that Diadiun's article appeared on the sports page—a traditional haven for cajoling, invective, and hyperbole. The article itself was under the express byline of "By TED DIADIUN[,] News-Herald Sports Writer." In this broader context we doubt that a reader would assign the same weight to Diadiun's statement as if it had appeared under the byline "Law Correspondent" on page one of the newspaper. This is not to say that the article would be given no weight; on the contrary, there are doubtless individuals whose only contact with newsprint is the sports page and a favorite writer's column might well be given weight similar to the Gospel. On balance, however, a reader would

not expect a sports writer on the sports page to be particularly knowledgeable about procedural due process and perjury. It is our belief that "legal conclusions" in such a context would probably be construed as the writer's opinion. Moreover, the allegations that Milkovich or Scott "lied" based upon the erroneous quote by Meyer would appear to fall into the area of law where "* * * we protect some falsehood in order to protect speech that matters," *Gertz, supra*, at 341, particularly where, as in the instant case, the issues involved are of importance to the community and the vehicle for dissemination of the ideas is opinion.

Based upon the totality of circumstances it is our view that Diadiun's article was constitutionally protected opinion both with respect to the federal Constitution and under our state Constitution. We therefore affirm the judgment of the court of appeals.

Judgment affirmed.

HOLMES, DOUGLAS and WRIGHT, JJ., concur.

CELEBREZZE, C.J., and SWEENEY, J., separately concur in judgment only, and dissent in part.

C. BROWN, J., concurs in p[illegible]t and dissents in part.

HOLMES, J., concurring. I shall not at any length answer Justice Brown's very energetic exercise of his First Amendment rights other than to say that I, along with Justice Locher and Justice William Brown, dissented in *Milkovich* v. *News-Herald* (1984), 15 Ohio St. 3d 292, in that I felt that the law as pronounced by the majority in such case had no rational legal basis and should have been rejected, and not established as the law of this jurisdiction. Having stated what I felt to be the correct law then, I now embrace those words again as if herein restated. It does no violence to the legal doctrine of *stare decisis* to right that which is clearly wrong. It serves no valid public purpose to allow incorrect opinions to remain in the body of our law. Therefore, I concur in the syllabus and the opinion of the majority herein.

DOUGLAS, J., concurring. I enthusiastically concur in the result reached by the majority, but I wish to express my reasons for such conclusion separately.

Appellant, H. Don Scott, Superintendent of the Maple Heights Public Schools, attended a wrestling match between Maple Heights and Mentor High Schools, on February 8 or 9, 1974 (depending upon which part of the record you believe). Appellee, the News-Herald, published an article on January 8, 1975, written by appellee, Ted Diadiun, which gave an account of a fracas that occurred at the match. The article also told of the subsequent sanctioning by the Ohio High School Athletic Association of the Maple Heights team and coaches for their involvement in the disturbance. In addition, the article expressed the writer's view that these sanctions were removed on January 7, 1975 because appellant and another, at a hearing in November 1984, misrepresented the events leading to their imposition.

I

Upon the occasion of this court's first review of the content of the article in question, the court found "* * * that the statements in issue are factual assertions as a matter of law, and are not constitutionally protected as the opinions of the writer." *Milkovich* v. *News-Herald* (1985), 15 Ohio St. 3d 292, 298-299. I emphatically disagree with that finding. Clearly, the sentiments expressed by the writer are opinion, and today the majority has rightfully recharacterized them as such. Accordingly, this opinion enjoys the protection afforded such speech by the First Amendment.

The First Amendment militates the protection of unrestricted and hearty debate on issues of concern to the public, including the protection of what "may well include vehement, caustic, and sometimes unpleasantly sharp attacks * * *." *New York Times Co.* v. *Sullivan* (1964), 376 U.S. 254, 270. This constitutional protection does not depend for its vitality upon "the truth, popularity, or social utility of the ideas and beliefs which are offered," *N.A.A.C.P.* v. *Button* (1963), 371 U.S. 415, 445; but, rather, "[f]ree speech concerning public affairs" is to be safeguarded because such speech "is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana* (1964), 379 U.S. 64, 74-75.

Neither factual error nor defamatory content is sufficient to remove the constitutional shield from criticism of official conduct. *New York Times Co., supra*, at 273. Although the use of calculated falsehoods "[is] no essential part of any exposition of ideas * * *," *Chaplinsky* v. *New Hampshire* (1942), 315 U.S. 568, 572, the Supreme Court has recognized that "erroneous statement is inevitable in free debate, and * * * it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need * * * to survive' * * *." *New York Times Co., supra*, at 271-272, relying in part on *N.A.A.C.P., supra*, at 433. Thus, even if the author's comments in this case contained half-truths and misinformation, such factual error "affords no * * * warrant for repressing speech that would otherwise be free * * *." *New York Times Co., supra*, at 272. Accordingly, except in cases where the author acts with malice, we are obliged to "protect some falsehood in order to protect speech that matters." *Gertz* v. *Robert Welch, Inc.* (1974), 418 U.S. 323, 341. See, also, *St. Amant* v. *Thompson* (1968), 390 U.S. 727, 732.

The chilling effect that fear of libel suits places on the media is exacerbated in the case of local newspaper publishers who can least afford costly damage awards. It is in these cases, most particularly, that the antithetical

relationship between free expression and the threat of liability is most evident. Accordingly, we would do well to remember that every concession to libel will most assuredly result in compromising freedom of the press. It is with these sentiments that I wholeheartedly concur in the majority's overruling of this court's decision in *Milkovich*, *supra*. Our decision today goes a long way in providing assurance to local media that they remain free to print the news we all need to know.

II

A decision favorable to the appellees in this case can rest solely on our determination that the complained-of article is constitutionally protected opinion. However, even if it were not, appellant, as a public official, would be required to prove that the article was published with actual malice in order to prevail. *New York Times Co., supra; Dupler* v. *Mansfield Journal* (1980), 64 Ohio St. 2d 116 [18 O.O.3d 354]. In *New York Times Co.*, the court did not determine "how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of * * * [the actual malice] rule, or otherwise to specify categories of persons who would or would not be included." *Id.* at 283, fn. 23. However, guidance was provided two years later in *Rosenblatt* v. *Baer* (1966), 383 U.S. 75, 85, where the court said:

"It is clear * * * that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."

The conclusion that the appellant meets the *Rosenblatt* criteria by virtue of his position as superintendent of schools is undeniable. There is no doubt that as a superintendent, appellant had responsibility for and control over the administration of the school system. R.C. 3313.47 and 3319.01.[3] In addition, "the public has an interest in the qualifications and performance of" appellant as superintendent, "beyond the general public interest in the qualifications and performance of all government employees * * *." *Rosenblatt*, *supra*, at 86. Furthermore, appellant's position was "one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy." *Id.* at 87, fn. 13. Public scrutiny of appellant's official conduct, as well as those aspects of his private life which relate to his suitability for his position, was an inconvenience which

[3] R.C. 3313.47 states in pertinent part:

"Each city, exempted village, or local board of education shall have the management and control of all of the public schools of whatever name or character in its respective district. * * *"

R.C. 3319.01 states in pertinent part:

"The superintendent of a school district shall be the executive officer for the board. * * *"

he no doubt endured. Finally, the decision of the majority herein regarding appellant's designation as a public official is consistent with the holdings of other courts. See *Palm Beach Newspapers, Inc.* v. *Early* (Fla. App. 1976), 334 So. 2d 50, certiorari denied (1977), 354 So. 2d 351; *Cone* v. *Phipps Broadcasting Stations* (D. Ga. 1979), 5 Media L. Rep. (BNA) 1972; *State* v. *Defley* (La. 1981), 395 So. 2d 759. Accord *Pickerington* v. *Bd. of Edn. of Twp. H.S. Dist. 205* (1967), 36 Ill. 2d 568, 225 N.E. 2d 1.

Assuming *arguendo* that appellant was not a public official, then alternatively, as a public figure, appellant would also be required to prove that the article in this case was published with actual malice. In *Curtis Publishing Co.* v. *Butts* (1967), 388 U.S. 130, the court decided two separate cases, consolidated for review.[4] The first case involved Butts, the athletic director at the University of Georgia, and the second case involved Walker, a retired career army officer who was prominent in the local community. The court held that both men were public figures, indicating two ways in which an individual may become so classified. The court elaborated on those alternatives in *Gertz*, *supra*, at 351:

"* * * That designation may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions."

Although it may be debatable whether appellant was so famous or notorious "that he [became] a public figure for all purposes," it is clear that as superintendent of schools, and thus the person who bears ultimate responsibility for the melee, appellant was undisputably a central figure in this particular controversy. As such, he was clearly a public figure for purposes of this case.

As stated above, a public official or public figure must show actual malice in the publication of a defamatory article in order to prevail. Actual malice is explained as the publication of a statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co.*, *supra*, at 280. See, also, *Dupler*, *supra*, at 118-119. Actual malice must be shown by clear and convincing evidence. *Gertz*, *supra*, at 342. A showing of reckless conduct requires "sufficient evidence to permit the conclusion that the * * * [publisher] in fact entertained serious doubts as to the truth of his publication." *St. Amant*, *supra*, at 731. In the recent case of *Bose Corp.* v. *Consumers Union of United States, Inc.* (1984), 466 U.S. 485, 512-513, the court held that to demonstrate actual malice, a

[4] *Butts* was decided together with *Associated Press* v. *Walker*, on certiorari to the Court of Civil Appeals of Texas, Second Supreme Judicial District.

public figure must produce evidence that the defendant realized the inaccuracy of the statement at the time of publication.

The record in this case does not contain any proof that appellees had knowledge of the falsity of the publication if, in fact, any part of the article was false. Even though it is apparent from the record that appellee Didiun did not verify the information he allegedly got from Dr. Meyer, this court stated in *Dupler*, *supra*, at 119, that "[s]ince reckless disregard is not measured by lack of reasonable belief or of ordinary care, even evidence of negligence in failing to investigate the facts is insufficient to establish actual malice." Accordingly, appellant could not prevail in this defamation action.

III

Assuming, for the sake of argument, that the appellant in this case was not a public official or public figure and that the statements concerning him were not protected opinion, the question then arises as to what should be the standard applied in cases involving defamation of *private persons*. In *Gertz*, the court retreated from its holding in *Rosenbloom* v. *Metromedia, Inc.* (1971), 403 U.S. 29, that libelous statements about a private person involved in a matter of public concern were privileged. The court held that liability would result where actual malice was established. Indicating, in the opinion of the plurality of that court, that the balance between free speech and private reputation had tipped too far toward free speech, the *Gertz* plurality at 346 concluded that *Rosenbloom* transgressed the states' legitimate interest in compensating injury to the reputation of private individuals. Additionally, the court indicated that private individuals were more deserving of recovery because they had not sought the attention, typically have less opportunity for rebuttal and are, therefore, more vulnerable to defamatory injury. *Gertz*, *supra*, at 344-345. Consequently, the *Gertz* court held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Id.* at 347. However, at the same time, the court also eliminated the common-law doctrine of presumed damages and restricted recovery to compensation for actual injury. *Id.* at 349.

In *Embers Supper Club, Inc.* v. *Scripps-Howard Broadcasting Co.* (1984), 9 Ohio St. 3d 22, 25, this court adopted an ordinary negligence standard for Ohio, stating:

"We are persuaded that the negligence standard of review is appropriate in this area. In cases involving defamation of private persons, where a prima facie showing of defamation is made by the plaintiff, the question which a jury must determine by a *preponderance* of evidence is whether the defendant acted *reasonably* in attempting to discover the truth or falsity or defamatory character of the publication." (Emphasis added.)

It is my belief that the *Embers* decision was ill-considered and that a simple negligence standard is inappropriate. Any standard that punishes certain speech is likely to encourage self-censorship. Thus, the validity of any judicially contrived scheme which leads to such a result requires an identifiable state interest that is an appropriate counterweight for our constitutionally protected interest in unfettered speech. Rules, impervious to constitutional attack when applied to ordinary human behavior (*i.e.*, one must exercise reasonable care in conduct), have to be altered or discarded when used to regulate speech. Although I would not require proof of actual malice, where private persons are involved, some intermediate standard is needed. This standard would require some showing of recklessness on the part of the defendant. Alternatively, a showing of negligence should require a greater quantum of proof.

In *New York Times Co.*, the court held that an act of recklessness was sufficient to prove malice. Thus, a defamatory statement published recklessly could render the publisher liable. My problem with this equation is that malice is intent-based and recklessness is not. Black's Law Dictionary (5 Ed. Rev. 1979) 862, defines "malice" as:

"The intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will imply an evil intent. A condition of mind which prompts a person to do a wrongful act willfully, that is, on purpose, to the injury of another, or to do intentionally a wrongful act toward another without justification or excuse. A conscious violation of the law (or prompting of the mind to commit it) which operates to the prejudice of another person. A condition of the mind showing a heart regardless of social duty and fatally bent on mischief. * * *" (Citations deleted.)

"Recklessness" is defined in Black's, *supra*, at 1142-1143, as:

"Rashness; heedlessness; wanton conduct. The state of mind accompanying an act, which either pays no regard to its probably or possibly injurious consequences, or which, though forseeing [*sic*] such consequences, persists in spite of such knowledge. Recklessness is a stronger term than mere or ordinary negligence, and to be reckless, the conduct must be such as to evince disregard of or indifference to consequences, under circumstances involving danger to life or safety of others, although *no harm was intended.* * * *" (Citation deleted, emphasis added.)

Thus, the knowledge and appreciation of a risk, short of substantial certainty, are not the equivalent of intent. A publisher who acts in the belief or consciousness that the publication of an article involves the potential loss of reputation or harm to a private individual may be negligent and if the risk is great, his conduct may be characterized as reckless or wanton, but it should not be classed as an intentional wrong. Accordingly, actual malice should lie only upon a showing of the intentional publication of false statement. Where private individuals are involved, rather than a showing of mere negligence, I would require a showing of recklessness or gross negligence, in derogation of accepted journalistic standards.

This approach was taken in the case of *Chapadeau* v. *Utica Observer-Dispatch, Inc.* (1975), 38 N.Y. 2d 196, 341 N.E. 2d 569. The New York Court of Appeals held at 199 that:

"* * * [A] party defamed may recover * * * [once he establishes] by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties."

The application of such a standard strikes a more appropriate balance between the First Amendment freedoms guaranteed the press and the individual's right to privacy.

Alternatively, if an ordinary negligence standard is to be applied, the quantum of proof required should be more than a preponderance of evidence. Although the "beyond a reasonable doubt" standard is exclusively applied in criminal cases, it is my opinion that a showing of its functional equivalent should be required in private person libel suits. Operationally, this would require a plaintiff to prove that no reasonable doubt exists as to a publisher's failure to exercise due care under the circumstances.

Regardless of the nature of the harm, states have a legitimate interest in providing their citizens with a remedy. However, the presence of our First Amendment values requires states to use finer, more discriminating instruments to regulate speech in order to protect those values. I would overrule *Embers* in favor of a standard or quantum of proof which accommodates both protection of speech and press and the state's interest in redressing harm to its citizens.

IV

In conclusion, the First Amendment guarantee of freedom of speech provides us with the right to think as we will and to speak as we think. *Whitney* v. *California* (1927), 274 U.S. 357, 375, Brandeis, J., concurring. When we are tempted, in any way, to move to restrict these precious rights, it is well to remember the historical consequences of the formulation of the First Amendment. When the Constitution was adopted, a number of people strongly opposed it on the basis that the document contained no Bill of Rights to safeguard certain freedoms. See 1 Annals of Congress (1834) 448 *et seq.* One of the greatest fears was that new powers granted to a central government might be used to curtail freedom of religion, press, assembly and speech. In answer to these concerns, James Madison suggested a series of amendments which, if adopted, would assure that these great liberties would remain safe and beyond the power of *any* branch of government to abridge. It is my judgment that in preserving the freedoms of speech and press, guaranteed by the First Amendment, we must accord protection to the expression of ideas we abhor or sooner or later such protection of expression will be denied to the ideas we cherish.

The First Amendment gives a special protection to the press from the chilling effect of defamation litigation. This is a protection we must preserve at any and all cost and, accordingly, as far as the majority's decision today reinforces this protection, I heartily concur.

WRIGHT, J., concurring. I concur in Justice Locher's decision. He provides the bench and bar with sensible guidelines as to when a writing should be treated as an expression of opinion, and a meaningful definition of who qualifies as a public figure.

Almost two hundred years after the passage of the First Amendment guarantee of freedom of speech, some folks are still debating the wisdom of that idea. That, of course, is what this case is all about. All of us should be free to speak, read or hear views of whatever may be of interest. It is this particular right that distinguishes the rights of our citizenry from those of people living under fascism or communism.

As the law of libel has developed in this country, courts have been forced to distinguish between statements of fact and opinion. The common law allowed libel defendants a qualified privilege of fair comment on matters of public interest when the statements were based upon disclosed or publicly available facts and made honestly and without malice. See, *e.g.*, Prosser, Law of Torts (4 Ed. 1971) 819-820. In *Gertz* v. *Robert Welch, Inc.* (1974), 418 U.S. 323, the United States Supreme Court raised statements of opinion to the level of constitutionally protected free speech. Justice Locher quotes with approval the basic premise of *Gertz* that: "* * * Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. * * *" *Id.* at 339-340. I believe the framers of our Constitution felt that an informed electorate was the genius of our system. Thus, in my view, free speech is the brightest star in our constitutional constellation.

Sharp criticism of a governmental official produces a far greater public good in a democracy than does artificial respect fostered by suppression of such opinion. "Progress generally begins in skepticism about accepted truths. The danger that citizens will think wrongly is serious, but less dangerous than atrophy from not thinking at all. Thought control is a copyright of totalitarianism, and we have no claim to it. It is not the function of our government to keep the citizen from falling into error; it is the function of the citizen to keep the government from falling into error." *American Communications Assn.* v. *Douds* (1950), 339 U.S. 382, 444. If this court sanctions in any form interference with the ideas of the opinion-maker, our claim to be guardians of a free press is hollow.

As Judge Harry T. Edwards said from the bench during oral argument in *Ollman* v. *Evans* (C.A. D.C. 1984), 750 F. 2d 970, "When you read the [libel] cases, they are a mess." Sanford, Libel and Privacy (1985) 107. It is practically impossible to reconcile the case law in this area and Justice

Locher has wisely eschewed such a course. Instead, we have made it clear that opinions stated in a column, cartoon or an editorial are constitutionally protected free speech. Thus, rather than rely on a legacy of confusion, we have adopted the fundamental premise that the media has the right as well as the duty to inform the public through editorial comment, however harsh, on any matter of genuine public interest.

I agree with Justice Locher's rejection of the standard found in the Restatement of the Law 2d, Torts (1977) 170-172, Section 566, Comment *a*, which provides that "mixed" statements of fact and opinion are libelous if the underlying facts are not stated and if the opinion can reasonably be taken to imply the existence of defamatory facts. The Restatement approach focuses on possible reader reaction, which is a difficult standard for evaluation. Also, the Restatement approach requires courts to engage in the nearly impossible task of forming standards for intelligently analyzing the difference between a "pure" statement of opinion as opposed to a "mixed" opinion that implies defamatory facts.[6] Justice Locher has wisely held that any statement of opinion, whether pure or mixed, will not form the basis for an action in tort.

I would go a step further than my colleagues, however, and grant the media the right to attain absolute protection by identifying an article as opinion. A column without such a label which is outside the editorial opinion portion of the paper would be treated as fact and be afforded only the limited protection articulated in *New York Times Co.* v. *Sullivan* (1964), 376 U.S. 254. A like test would apply to radio or television programming. I would reject any approach that requires the trial court to determine whether or not the statements are susceptible to proof of truth or falsity. If the context of the statement is in the nature of editorial comment it should be treated as privileged free speech.

This "bright-line" rule would eliminate the uncertainty of characterizing statements as opinion or fact. It would provide predictability and fairness in an area of the law which is presently a legal morass. Such a rule would be helpful to the media and would serve the public interest as it lends itself to ready compliance yet protects vital free speech interests in the expression of opinion.

The dissenters' remarks concerning the doctrine of *stare decisis*

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[6] As an illustration, note the learned remarks contained in Notes, Fair Comment (1949), 62 Harv. L. Rev. 1207, 1213: "The statement in question should be regarded as one of fact if a substantial number of readers would understand it as intended to convey ideas the asserted validity of which is independent of the belief of the person making the statement. If a substantial number of readers would understand the statement to rest solely on the opinions of the person making the statement, the statement should be regarded as comment and should come within the privilege if the matter is one of public interest." I pity the poor trial judge who attempts to wrestle with such an ambiguous definition! The reader-oriented approach obviously provides little or no assistance to the bar or bench as to how one may gauge the reaction of readers, what sampling is necessary, or which readers to consult.

deserve comment. First of all, I rejoice in their charismatic conversion. Second, it is clear that the demise of *Milkovich* v. *News-Herald* (1984), 15 Ohio St. 3d 292, presents no revolutionary changes in the law of libel. To the contrary, a dearth of decisional law supports *Milkovich* and much case law militates a contrary conclusion. Third, as Justice Locher points out, when a past decision of this court is *plainly* mistaken and destructive of a constitutional imperative such as freedom of speech, we should not hesitate to confess our error. As Justice Locher demonstrated, in *Milkovich* no test was offered with regard to distinguishing fact from opinion and no analysis was given to support the court's conclusion. Thus, the "rationale" in *Milkovich* was fatally flawed.

I believe in the doctrine of *stare decisis* and I will continue to support this doctrine, regardless of my personal predilections as to public policy in some particular area of the law. Precision and consistency are values of the highest order in judicial decision-making. Populist jurisprudence only creates unpredictability in the law. While understanding that the common law is not immutable, we should strive to follow past experience and precedent. Justice Locher's opinion does no violence to these concepts.

Accordingly, I concur.

CELEBREZZE, C.J., concurring in judgment only, and dissenting in part. I wholeheartedly concur in the majority's conclusion that appellant is a public official. Similarly, I support the majority's determination that appellant failed to establish the requisite actual malice in the publication of the article at issue. With the resolution of these two issues and this court's affirmance of the grant of summary judgment to appellee, the News-Herald is insulated from liability. But the majority plunges on. It needlessly overrules our prior decision in *Milkovich* v. *News-Herald* (1984), 15 Ohio St. 3d 292, certiorari denied (1985), ___ U.S. ___, 88 L. Ed. 2d 305, in which this court held that the statements in this same article were, as a matter of law, factual assertions.[6] The clarity of today's majority opinion gives way to the amorphous "totality of the circumstances" test which is used to complete the Jekyll and Hyde transformation of this newspaper article from fact to opinion.[7] This test is not only unworkable, it is applied by the majority in self-contradictory fashion to reach an untenable result.

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[6] If our decision in *Milkovich*, *supra*, was so "plainly" in "error," one wonders how the United States Supreme Court could have allowed the decision to stand.

[7] The totality of the circumstances test adopted by the majority was enunciated in *Ollman* v. *Evans* (C.A. D.C. 1984), 750 F. 2d 970, 979, in which the court stated, in pertinent part:

"We believe * * * that courts should analyze the totality of the circumstances in which the statements are made to decide whether they merit the absolute First Amendment protection enjoyed by opinion. * * * [W]e will evaluate four factors in assessing whether the average reader would view the statement as fact or, conversely, opinion. * * *

"First, we will analyze the common usage and meaning of the specific language of the

The article culminates with the statement that appellant lied under oath while testifying at a court hearing, i.e., that appellant committed the crime of perjury. The majority admits that the truth or falsity of such a statement can be verified. (I must, however, question the majority's implication that appellant should somehow cause a criminal prosecution against himself to do so.)

In its tortuous route to the preordained result that this denigrating statement is a constitutionally protected expression of opinion, the majority next searches for qualifying "language of apparency." While first stating that terms such as "I think" or "in my opinion" are *not* dispositive, the majority then ignores its own logic by concluding that readers would assume this entire article was opinion merely because it was captioned "TD Says" and "Diadiun says." This conclusion escapes me. Rather, I would have thought, as Justice Brown points out, that the purpose of a caption is to identify the writer.

The majority finally proceeds to the determination that readers would not construe the statement in this news article as fact because it appeared on the sports page.

Apparently, the majority feels that serious journalism and factual reporting are not likely to be found in the sports pages of a newspaper. I must disagree. Sports journalists are no less likely than other journalists to be informed about procedural due process or perjury, as recent lengthy accounts of legal proceedings involving drug abuse by professional athletes demonstrate. Sports writers are as accountable for the accuracy of their reporting as are their brother news journalists. The assumption that most readers view sports columnists as colorful and opinionated but innately lacking in credibility is, in my view, inaccurate, condescending, and cannot serve as the basis for the ridiculous conclusion that the statement in issue was "probably" opinion because it appeared on the sports page. Would the majority be forced to conclude that the statement in this article was "probably" fact had it appeared on the front page? If in doubt on the accuracy of an article, should editors run the news story in the sports or comic section to be on the safe side?

I am convinced that this court was right the first time, in *Milkovich*, *supra*. Although the column undeniably contained the writer's opinion in certain respects, it also contained the specific factual assertion that appellant lied while under oath. This statement was verifiable. Its location on the sports page was not a reliable indication that this statement was to be taken as opinion. Finally, there was nothing in this article which would have alerted the reader that this statement was intended to be the writer's opinion. To the contrary, Diadiun bolstered the assertion in part with a

challenged statement itself. * * * Second, we will consider the statement's verifiability * * *. Third, * * * we will consider the full context of the statement * * *. Finally, we will consider the broader context or setting in which the statement appears. * * *"

quote from Dr. Harold Meyer to the effect that appellant had told some "pretty darned unfamiliar" stories to the judge. In essence, Diadiun was telling his readers this was not just his biased view, but rather the objective conclusion of an impartial observer at the hearing. From this followed Diadiun's direct and factual assertion that, based on Dr. Meyer's observations, appellant had lied under oath. Try as it may, the majority cannot drown this fact in a sea of opinion.[8]

There is an additional pitfall in today's conclusion that this alleged defamatory statement is not actionable. The majority acknowledges that the "clear impact" of this statement, as "commonly understood," is that appellant committed the crime of perjury. Such criminal accusations, even if expressed as opinion, are not entitled to absolute constitutional protection.

In *Rinaldi* v. *Holt, Rinehart & Winston, Inc.* (1977), 42 N.Y. 2d 369, 397 N.Y.Supp. 2d 943, 366 N.E. 2d 1299, certiorari denied (1977), 434 U.S. 969, a state court judge brought a libel action against the publishers of a book which described him as being corrupt. The New York Court of Appeals held at 382 that this statement was not protected as opinion.

"Accusations of criminal activity, even in the form of opinion, are not constitutionally protected. * * * While inquiry into motivation is within the scope of absolute privilege, outright charges of illegal conduct, if false, are protected solely by the actual malice test. As noted by the Supreme Court of California, there is a critical distinction between opinions which attribute improper motives to a public officer and accusations, in whatever form, that an individual has committed a crime or is personally dishonest. No First Amendment protection enfolds false charges of criminal behavior." Accord *Cianci* v. *New Times Publishing Co.* (C.A. 2, 1980), 639 F. 2d 54, 64; *Gregory* v. *McDonnell Douglas Corp.* (1976), 17 Cal. 3d 596, 604, 131 Cal. Rptr. 641, 552 P. 2d 425.

I am unable to see the qualitative difference between a charge that a public official is corrupt and the instant accusation that a public official committed the crime of perjury.

Thus, not only does the majority strain to label as opinion the factual assertion that appellant lied under oath, it also fails to recognize that such a statement, even if opinion, is not entitled to unqualified constitutional protection where criminal conduct is alleged. Therefore, the appellees in the instant cause are entitled to the protection of the rule in *New York Times Co.* v. *Sullivan* (1964), 376 U.S. 254 (plaintiff who is a public official

[8] Under the elastic test adopted by today's majority, the only thing which is clear is that a statement's characterization as fact or opinion is truly in the eye of the individual judge. Rather than providing "predictability," the cryptic totality of the circumstances test leaves those in search of stability with as much guidance as that provided by the newspaper's daily horoscope.

must prove with convincing clarity that defendant acted with actual malice), but no more.

Accordingly, since I agree that appellant is a public official and has not established actual malice in the publication of this article, I concur in the judgment. I respectfully dissent from my brothers' unfortunate conclusion that the alleged defamatory statement in this article is an opinion entitled to absolute constitutional protection.

SWEENEY, J., concurring in judgment only, and dissenting in part. While I concur in the majority's decision with respect to appellant's status as a public official, and that appellant failed to prove that the article in issue was written with actual malice, I must dissent from the majority's nullification of our very recent opinion in *Milkovich* v. *News-Herald* (1984), 15 Ohio St. 3d 292. In addition to the well-reasoned points raised by Chief Justice Celebrezze and Justice Clifford Brown, I wish to make several of my own observations.

The majority opinion chides the *Milkovich* majority for not resting its decision on any particular rule, and then sets forth a nebulous "totality of circumstances" test that pretends to establish an analytical framework for resolving controversies dealing with the fact-opinion dichotomy. The central problem with the test provided by the majority is that it tumbles into the very pitfalls that it claims should be avoided.

In exploring the nuances of the majority's test, we find that with respect to the first factor, the majority readily concedes that the language used in the instant article, standing alone, "would have stated a valid cause of action." Thus, this factor does not fortify the majority's final conclusion in any way.

The second factor employed by the majority, *i.e.*, whether the allegedly libelous statements made are verifiable, is inherently suspect, especially in light of the facts of the cause *sub judice*. The majority's flawed analysis under this factor would require appellant to press perjury charges against himself in order to gain an acquittal, and then, if successful, commence the instant libel action. The absurdity inherent in this factor is further revealed by the fact that even if appellant were to be acquitted of perjury, it would not necessarily make appellees more likely to be liable for defamation, since each action would entail differing burdens of persuasion.

Turning to the third factor enunciated by the majority, we find confusion and inconsistency throughout its reasoning. The majority chastises this court's opinion in *Milkovich, supra*, for being conclusory, and then turns around and engages in the type of conclusory analysis that it condemns! The majority spends much time discussing the relevancy of labeling or "language of apparency," but fails to judiciously scrutinize the content of the article in issue. Although the majority is correct in stating that the author of the article was undeniably biased, it fails to carefully consider the ramifications of the message the author is conveying.

In my view, the instant article sets forth both assertions of fact and

the opinions of its author. In essence, the author states as fact that he attended the wrestling match and the OHSAA hearing, and that Dr. Meyer was present at the due process hearing. After quoting Meyer concerning Milkovich's and Scott's testimony (a quote which Meyer denies making), the author asserts that anyone who attended the wrestling meet knows in his heart that Milkovich and Scott lied under oath at the due process hearing. Such, in my mind, is clearly an assertion of fact.

While the majority is "mindful" of Judge Friendly's observation that, "[i]t would be destructive of the law of libel if a writer could escape liability for accusations of crime simply by using, explicitly or implicitly, the words 'I think,' " *Cianci* v. *New Times Publishing Co.* (C.A. 2, 1980), 639 F. 2d 54, 64, the majority fails to effectively and seriously reconcile this ideal in relation to the article in issue. In this vein, I believe that this court should reaffirm the principles articulated in *Milkovich, supra*, and apply the rationale supplied by the court in *Cianci, supra*, along with the decisions rendered in *Rinaldi* v. *Holt, Rinehart & Winston, Inc.* (1977), 42 N.Y. 2d 369, 397 N.Y. Supp. 2d 943, 366 N.E. 2d 1299, certiorari denied (1977), 434 U.S. 969; and *Gregory* v. *McDonnell Douglas Corp.* (1976), 17 Cal. 3d 596, 131 Cal. Rptr. 641, 552 P. 2d 425.

Under the majority's fourth factor, a veritable *per se* rule is created whereby anything defamatory that appears in the sports pages is automatically non-actionable. As with the other factors used in this new "test," the "context" factor is full of self-contradictions and conclusions based on perfunctory and hollow analysis. Also, the majority scoffs at the notion of applying "a bright-line rule" to classify articles as being assertions of fact or opinion, and then curiously engages in the bright-line rule-making that it scorned in its third factor, by holding, *inter alia*, that "'TD Says" means TD's opinion, and essentially that anything appearing in the sports pages is, by definition, opinion. Particularly disturbing is the majority's flippant remarks about sports writers and the people who read the sports pages. Such a tasteless and unwarranted attack is both haughty and snobbish.

In sum, the majority's new "test" is in reality no test at all, because its components can be juxtaposed to forge any interpretation that the user of the "test" desires. I believe that the majority's "test" is patently arbitrary, and too unreliable to be given this court's imprimatur.

Equally flawed, in my view, is the concurring opinion that attempts to solve the fact-opinion distinction by suggesting that the print media label an article as an "editorial" or "opinion," in order to signal readers that the article that follows is constitutionally protected. While such an approach would arguably add precision to the reconciliation of fact-opinion issues, it would necessarily be deficient since it is the content as well as the context of an article that assists the ultimate determination of whether a particular newspaper article presents a potentially redressable action in libel. As applied to the instant cause, even if I were to accept the

majority's premise that "TD Says" indicates that the article represents only the views of the author, I would still be unpersuaded that the accusations of perjury made by the writer should be unconditionally protected as the majority preaches. Again, I sincerely believe that the majority has seriously erred by refusing to place any legitimate weight on the cogent rationale adopted by this court in *Milkovich*, and set forth in *Cianci*, *supra*, and other like precedents.

With respect to the discussions of *stare decisis*, I find it somewhat amusing that some of my fellow justices have been forced to explain why this doctrine should not be applied in this cause. One of the concurring opinions states that *stare decisis* has no application *vis-a-vis* the *Milkovich* case because "a dearth of decisional law supports *Milkovich* and much case law militates a contrary conclusion." Even if this assertion were correct, which it is not, such a rationale is wholly inadequate. Simply because there is a "dearth of decisional law" supporting a holding does not make such holding ill-conceived or untenable; otherwise, under the concurring opinion's reasoning, *Broum* v. *Board of Education* (1954), 347 U.S. 483, should have been overruled shortly after its decision, since "much case law militates a contrary conclusion" in line with the prior ruling rendered in *Plessy* v. *Ferguson* (1896), 163 U.S. 537.

All of the foregoing notwithstanding, I am pleased that the flood of separate concurring opinions in this cause exalting the primacy of the First Amendment finally pays due reverence to the United States Constitution and the freedoms it is supposed to guarantee to our citizens. Given the wholesale destruction of the Fourth Amendment by this court in recent cases, perhaps this new-found enlightened reasoning employed today will now spread to other constitutional controversies.

In any event, it would be more satisfactory if some of the concurring majority would restrain the pompous discourse concerning the importance of freedom of the press, and dispense with the platitudes. A more thorough approach to constitutional analysis would lead them to the inevitable discovery that the framers of the Ohio Constitution were especially cognizant of the potential for abuse that could occur in the establishment of a free press, and that is why this guarantee was somewhat tempered with a modicum of guidelines. Section 11, Article I of the Ohio Constitution states in plain and concise language: "Every citizen may freely speak, write, and publish his sentiments on all subjects, *being responsible for the abuse of the right;* and no law shall be passed to restrain or abridge the liberty of speech, or of the press. * * *" (Emphasis added.)

Thus, several of the majority are careless when stating, in effect, that the right to a free press should never be encumbered with any checks whatsoever. Certainly the framers of the state Constitution did not share this view when they crafted the above-stated constitutional provision. Under Ohio law, responsibility for the abuse of the right to freely speak and publish obviously and necessarily includes the limitations established in the law of defamation.

Overall, several of the majority seem all too willing to forget the numerous reports we hear concerning individuals, some with great notoriety and others who are not so well known, who are libeled by certain sensationalistic gossip publications typically found at most grocery store checkouts. I do not really intend to single out those particular publications, because many are scrupulous about the limits inherent in the right to a free press, and are aware of the harm that can be wrought by a libelous attack or accusation. However, I do intend to drive home a point to those in the majority who seem to intimate that freedom of the press necessarily means total immunity from suit, regardless of the venom or falsity contained in a particular news item.

There is no one sitting on this court who does not appreciate and cherish our constitutional guarantee of a free press; however, such a guarantee carries with it a duty owed to the public to be responsible and truthful, as well as bold and provocative. When this duty is seriously breached, the law provides injured persons with a mode of redress, which is why the law of libel was designed in the first place.

In closing, I wish to emphasize the abundant respect that I hold for the members of the journalistic profession. These individuals perform a vital function in society by disseminating topical information and commentary to the populace. Unfortunately, as is the case in all professions, a very small minority sometimes exceeds the limits of propriety by inflicting irreparable harm to the reputation of others. I am sure that the overwhelming majority of journalists would agree that some type of redress is necessary in appropriate cases, in order to uphold the integrity and ideals of the journalistic profession. In such cases, we rely on the courts to insure that the important interests underlying the First Amendment and Section 11, Article I of the Ohio Constitution are weighed in combination with Section 16, Article I of the Ohio Constitution, which sets forth the state's interest in compensating injury to the reputation of persons in our society. *Gertz* v. *Robert Welch, Inc.* (1974), 418 U.S. 323. Although such a task is, at times, extremely difficult, we must always strive for the attainment of equal justice for all under the law, in order to maintain those freedoms guaranteed in both the federal and state Constitutions. While a free press is essential to the maintenance of a truly democratic society, the right to a free press also guarantees implicitly, and in the case of the Ohio Constitution explicitly, the rights of the individuals who lack the means of counterargument to rebut defamatory statements which cause injury to their reputations.

Based on all the considerations heretofore discussed, I join the majority's judgment in this case, but I dissent from its unnecessary, capricious and unwarranted disposal of *Milkovich, supra.*

CLIFFORD F. BROWN, J., concurring in part and dissenting in part. I concur in the majority's conclusion that under the reasoning of *Rosenblatt* v. *Baer* (1966), 383 U.S. 75, appellant, H. Don Scott, as superintendent of

the local public schools, is a public official for purposes of the law of defamation and that, as such, Scott failed to prove actual malice as required by *Dupler* v. *Mansfield Journal* (1980), 64 Ohio St. 2d 116 [18 O.O.3d 354]. Therefore, I agree that the appellees were entitled to summary judgment in the instant case.

However, I am compelled to dissent from the majority's convenient reconsideration and reversal of this court's recent holding that the very article we considered today constitutes an assertion of fact. See *Milkovich* v. *News-Herald* (1984), 15 Ohio St. 3d 292. In my view, *Milkovich*'s characterization of the language at issue in the instant case was sound law and should not be disturbed. Further, given the majority's resolution of the other issues, its treatment of *Milkovich* is both overreaching and gratuitous.[9]

As the majority correctly recites:

"It is implicit in the doctrine of *stare decisis* that some principle be established that the public may rely upon with the understanding it will not lightly be overturned. The underlying rationale for *stare decisis* is the importance of constancy and consistency in law. In the absence of consistency and constancy the value of law in society is diminished. * * *"

But having recited the underpinnings of *stare decisis*, the majority rejects the doctrine in this case, based upon its distorted and incomprehensible view that our opinion in *Milkovich* failed to set forth a workable "rule." Clearly, the majority's reading of *Milkovich* would discount the paragraph wherein, having recited the options selected by other courts, we stated: "While we decline to establish a *per se* rule in determining what constitutes a protected opinion or a potentially redressable assertion of fact [as, I note, today's majority also purports to decline], our review of the instant cause leads us to conclude that the lower courts erred in holding that the statements in issue were nothing more than the writer's 'heartfelt' opinion. We find that the statements in issue are factual assertions as a matter of law, and are not constitutionally protected as the opinions of the writer." *Id.* at 298-299. On what basis did the *Milkovich* majority reach that conclusion? Our two-prong "test" immediately followed: "*Nothing in the article effectively precautions the reader that the author's statements are merely his considered opinions. The plain import of the author's assertions is that Milkovich, inter alia, committed the crime of perjury in a court of law.*" (Emphasis added.) *Id.* at 299. If the majority today is so ready to castigate the *Milkovich* test, certainly its solution is no improvement. Indeed, I maintain that even under the "rule" purportedly adopted

[9] One concurring opinion is advisory, dealing with pure *obiter dicta* which is designed to curry further adulation by the news media — which it most assuredly will — by intimating that *Embers Supper Club, Inc.* v. *Scripps-Howard Broadcasting Co.* (1984), 9 Ohio St. 3d 22, which was not argued below, should be overruled. The *Embers* case and the issues therein contained are not relevant to a determination of the present *Scott* case.

today by the "revolving door advocates" of *stare decisis*,[10] the statements considered in *Milkovich* and reconsidered today constitute assertions of fact and, as such, are not entitled to First Amendment protection as the opinions of the writer.

In applying its newly adopted "totality of circumstances test," even the majority concedes that the first factor, "the specific language used," creates "the clear impact of some nine sentences and a caption" that "appellant 'lied at the hearing after * * * having given his solemn oath to tell the truth.' " Thus, the language used states a factual assertion that appellant committed perjury. The majority so concedes, and the *Milkovich* majority so recognized.[11] (The only difference today is that the majority no longer seems to find this factor to be important.)

[10] I use the word "purportedly," because despite the majority's contorted application of its new and improved four-factor test, any reader of today's majority opinion can readily see the real rule adopted by the majority: in a libel case, *the newspaper always wins.*

[11] In determining whether a statement is fact or opinion, the majority advances a purported "test" involving "at least four factors," and in support thereof cites a host of legal precedents from federal jurisdictions. A review of these cited cases reveals that none of them provides even the remotest foundation for this "test."

In support of the first factor, "specific language used," the majority cites *Cianci* v. *New Times Pub. Co.* (C.A. 2, 1980), 639 F. 2d 54, which holds that an article stating that a mayor had been accused of rape was not protected as a "statement of opinion," and does not support the defendants' thesis herein that the Diadiun statement was opinion, not fact. *Cianci, supra*, supports the holding in *Milkovich* that the Diadiun news article was a statement of fact and not an opinion. *Lauderback* v. *American Broadcasting Companies, Inc.* (C.A. 8, 1984), 741 F. 2d 193, is inapplicable because it dealt with statements in a TV broadcast by defendant that an insurance agent was dealing unscrupulously with elderly citizens, and unlike the Diadiun statement here, did not involve an allegation of criminal conduct by plaintiff. The United States Court of Appeals held that representations that an insurance agent was guilty of unethical behavior constitute opinion protected by the First Amendment. Likewise, *Lewis* v. *Time, Inc.* (C.A. 9, 1983), 710 F. 2d 549, is inapplicable because the defendant did not assert a criminal act by plaintiff. Instead, the gist of the United States Court of Appeals' holding is that the "[a]lleged inference arising from [the] magazine article that the named attorney was a dishonest 'shady practitioner' was a constitutionally protected opinion, because the article set forth the facts underlying the opinion that the attorney was a 'shady practitioner,' i.e., state court judgments against the attorney for fraud and malpractice." *Id.* at paragraph nine of the headnotes.

Natl. Assn. of Letter Carriers v. *Austin* (1974), 418 U.S. 264, is also totally irrelevant. The case did not involve a statement by defendant of criminal acts by plaintiff. The court held, and properly so, that the use of the epithet "scab" in the union newsletter could not be the basis of a state libel judgment. The same is true of *Greenbelt Cooperative Publishing Assn.* v. *Bresler* (1970), 398 U.S. 6, which held that the word "blackmail" in the circumstances of the case was not slander when spoken at the city council meeting nor libel when reported in the newspaper articles which were accurate, it being clear no reader could have thought plaintiff was being charged with the commission of a criminal offense. The Diadiun article in the present case is not even a remote relative of the *Greenbelt* case.

Neither does the cited case of *Ollman* v. *Evans* (C.A. D.C. 1984), 750 F. 2d 970, have any relevancy. It held that statements set forth in a newspaper column questioning the nomination of the plaintiff, an avowed Marxist, to a university post, were constitutionally protected

The majority previous thereto stated that the determination of whether an averred defamatory statement constitutes opinion or fact is a question of law for the court, and not for a jury. (See *Milkovich, supra*, at 298, wherein we held *as a matter of law* that the statement was a factual assertion.) It then wends its tortuous way through a four-factor "totality of circumstances test," alternately labeling the so-called factors as concerns. This is all by way of leading to the majority's conclusion that the Diadiun statement that plaintiff lied under oath (committed perjury) was constitutionally protected opinion and not a statement of fact as a *matter of law* both under the federal Constitution and the Ohio Constitution. This sounds exactly like Big Brother in Orwell's Nineteen Eighty-Four, where, by convoluted reasoning, contradictory terms or concepts are considered to be synonymous.[12]

The majority also concedes that the *second* factor, "whether the statement is verifiable," operates in appellant's favor on the facts of this case, because "[u]nlike a subjective assertion the averred defamatory language is an articulation of an objectively verifiable event." The majority's determination of these first two factors in favor of plaintiff should conclusively support a finding that the article is a statement of fact accusing plaintiff of the crime of perjury, and is therefore defamatory *per se*. However, in my view, the majority's abortive attempt to clear up the law of defamation with a workable test breaks down as it proceeds further and attempts to apply the *third* and *fourth* factors.

When applying the *third* factor, the "general context of the statement," the majority gives lip service to the "potential for abuse" which would occur if terms such as "in my opinion" or "I think" were held conclusively to distinguish expressions of opinion from assertions of fact, but then proceeds to find phrases which are indistinguishable from those terms determinative in this case. In my (apparently "most gullible") view, the caption "TD Says" is merely a "catchy" means of identifying the writer, and does not cut distinctively one way or the other as a signal that what follows will be opinion or fact. Similarly, the second headline,

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expressions of opinion, rather than assertions of fact, and were not actionable in a defamation action. The newspaper article did not ascribe any criminal conduct to plaintiff as did the Diadiun article herein.

Nowhere do the above-cited cases, singly or collectively, suggest anything resembling a four-factor test as set forth by the majority today. The result-oriented majority is bent on overruling *Milkovich*. Any irrelevant precedent was grabbed to lend superficial credence to their analysis and to frustrate easy analysis. Ohio now is unique in having unintelligible gibberish as a standard for actionable defamation of a private citizen. No other jurisdiction has experimented in this frenzied manner with such a standardless standard.

[12] Big Brother, in Orwell's Nineteen Eighty-Four, says the following:
"War is Peace
"Freedom is Slavery
"Ignorance is Strength"

". . .Diadiun says Maple told a lie" merely identifies the author of the factual assertion which follows.

The point is that the majority's new "test" is, in practice, so malleable and spongy as to permit any interpretation anyone wishes. It will enable any judge or reviewing court to label any clearly libelous statement of *fact* as a statement of *opinion* and thereby for all practical purposes create absolute immunity for every congenital liar who publicly utters or writes slanderous or libelous statements. Most likely, given a close reading, the article in question combines assertions of fact with expressions of opinion in the hope that the facts asserted will bolster the impact of the opinions. Nonetheless, that combination should not detract from the majority's specific finding that the language used imparts "the clear impact" that appellant committed the crime of perjury, and that the article reinforces that "impact" with a quotation attributed to a named, apparently reputable source, a fact which the majority characterizes as merely "troubling." Given the lack of clear guidance that the majority's "test" provides, this is an ideal case to apply the doctrine of *stare decisis*.

Finally, I look to the majority's analysis of the *fourth* factor: "the broader context in which the statement appeared." The majority's suggestion that sports writers are inherently less believable than others (for example, a "Law Correspondent") ought to belie any perceived legitimate legal analysis which follows. Indeed, this "*fourth* factor" really adds nothing to the other factors discussed *supra*, and submerges further into the morass of a Serbonian bog those seeking to distinguish a statement of fact from one of opinion in any future case. The clear message of the majority in the second to last paragraph of its opinion is that in order to avoid a defamation suit, one should put the controversial statement on the sports page, which is another way of saying that any fact appearing on the sports page is not to be believed because it is mere constitutionally protected opinion. All of the so-called four factors, concerns and/or tests amount to no more than a geyser spouting judicial steam, fog, and mist.

I note with interest Justice Holmes' particular judicial hypocrisy[13] as to the doctrine of *stare decisis* which, by his presence in today's majority, amounts to a double-standard of justice. When displeased by the majority's holding, Justice Holmes has often pontificated as to the sanctity of *stare decisis* and irreverence by its disregard. See *Saunders* v. *Zoning*

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[13] I am particularly intrigued with Justice Holmes' concurrence, wherein he opines that "[i]t does no violence to the legal doctrine of *stare decisis* to right that which is clearly wrong. It serves no valid purpose to allow incorrect opinions to remain in the body of our law." If his position were not so transparently hypocritical on this case, I would welcome his conversion to my own oft-expressed views on the doctrine of *stare decisis*. However, I feel certain that his convenient retreat from his historical reliance on *stare decisis* will be limited to cases such as this one, in which he finds himself in a majority which is bound and determined to uphold the unabashed trammeling of the rights of individuals by big businesses such as the newspaper herein.

Dept. (1981), 66 Ohio St. 2d 259 [20 O.O.3d 244], in which Justice Holmes, dissenting, at 265, stated: "The flexibility effected by this decision, which, in effect, overruled syllabus law as pronounced by this court only nine months ago, * * * transforms the law of *stare decisis* into that which assumed a stability not unlike a revolving door. It would seem that the law of this state will be now governed by what might be the personnel of the court, or the panel hearing and writing upon a case, or both, at any given point in time." I note further that Justice Locher concurred in Justice Holmes' dissenting view in that case. And in *Shroades* v. *Rental Homes* (1981), 68 Ohio St. 2d 20 [22 O.O.3d 152], Justice Holmes, dissenting at 29, stated: "Again we find * * * that the law of this state, as most recently pronounced by this court, moves rapidly through the revolving door of change, further eroding any vestige of *stare decisis* that might remain as a legal principle to be followed by the bench and bar of Ohio." Further, at 31, Justice Holmes continued: "It would appear that 15 months is quite enough for the law of this state as pronounced by a majority of this court to be settled and followed by our legal community. * * * [T]he validity of *stare decisis* as a controlling principle in settling the law of this state is only valid under the condition of a non-changing pattern of the membership of the court—hardly a satisfactory condition of stability of the law upon which lower courts and practitioners in Ohio may reasonably rely.

"Believing in the principle of *stare decisis* where the same matter had recently been fairly debated and considered by this court, and where no additional relevant factors are presented which would alter our prior announcement on the subject, I would so adhere to our prior determination * * *."[14]

In the instant appeal, Justice Holmes now joins a bare majority of four which cavalierly overrules *Milkovich, supra,* decided less than two years ago and (coincidentally?) on the eve of this court's most recent change of personnel by the election of two new justices who took office in January 1985. These two new justices have joined Justices Holmes and Locher in smashing to smithereens their sacred doctrine of *stare decisis.* Justice Holmes has given nary the slightest indication for his apparent recant of reverence for the doctrine of *stare decisis.* Apparently, *stare decisis* is meaningful, in any case, only when Justice Holmes is part of a minority strongly opposed to the majority's visionary, progressive holdings. Justice Locher must share the same view. Such treatment truly renders *stare decisis* a doctrine of convenience in which the "revolving door" turns at the writer's pleasure.

In light of the transparently weak analysis the majority has employed to overrule and repudiate this court's recent holding as to precisely the

[14] See, also, *Baker* v. *McKnight* (1983), 4 Ohio St. 3d 125 (Holmes, J., dissenting, at 131); *Ady* v. *West American Ins. Co.* (1982), 69 Ohio St. 2d 593 [23 O.O.3d 495] (Holmes, J., dissenting, at 603).

same newspaper article at issue in *Milkovich,* Justice Holmes' own words in his dissent in *Wilfong* v. *Batdorf* (1983), 6 Ohio St. 3d 100, 109, again most appropriately describe the majority's action: "I strongly conclude that the law as most recently announced * * * should be followed by the court in this case. To do otherwise again completely demolishes any remaining semblance of the doctrine of *stare decisis* in this state. The only change that has taken place which would conceivably alter our position as announced in * * * [here, *Milkovich,* decided December 31, 1984] has been an intervening change of personnel on the court—precisely the type of changed circumstance that the doctrine of *stare decisis* has been relied upon to maintain the stability of the case law of this jurisdiction. What confidence may attorneys, judges and litigants have in the stability of the decisional law of this court? This query is self-answering."

The views expressed by the majority as well as by all three dissenting justices reveal that there is unanimity of all seven justices that the summary judgment in favor of defendants should be affirmed simply and solely by holding that plaintiff was a public official for defamation purposes, requiring proof of actual malice by defendants which, as a matter of law, was not established. We need go no further in reaching a unanimous judgment in favor of defendants.

In order to curry favor with the media at large in an election year, favor which is particularly beneficial to one of its majority, a majority of four rushes hell-bent to overrule *Milkovich.*[15] The so-called champions of *stare decisis* are anything but that when the prior decision is at odds with their own preconceived jurisprudential agenda. It takes more judicial courage and backbone to express what is right and just, confining the decision to the short, single issue necessary to complete the resolution of this case, than to curry popularity by appealing to the prejudices or predilections of the news media or any special group by writing a legal opus containing pseudo-erudition on an issue which in any event was wholly unnecessary for a complete determination of this case.

All of the foregoing is apparent from the majority's vapid, meaningless, so-called four-factor test to determine if a defamatory statement is a statement of fact or opinion. Where this issue exists in any libel trial in future cases involving the press as a defendant, the trial judge might as well simply direct a verdict for the defendant, or even better, routinely grant summary judgment motions made by the defense, because, given the result of the case at bar, it is difficult to imagine what otherwise libelous statements of fact will remain actionable once they have been printed in a newspaper.

[15] Curiously, the majority cites to the dissent of two justices of the United States Supreme Court to the petition for certiorari in *Milkovich* and, *sub silentio,* intimates that this dissent is the law of the case, namely, that *Milkovich* was a public figure. However, the majority opinion conveniently ignores the fact that seven justices of the United States Supreme Court did not share the views about *Milkovich* which were articulated in that dissent.

Copy of Article Giving Rise to this Case.

Maple beat the law with the 'big lie'

By TED DIADIUN
News-Herald Sports Writer

Yesterday in the Franklin County Common Pleas Court, judge Paul Martin overturned an Ohio High School Athletic Assn. decision to suspend the Maple Heights wrestling team from this year's state tournament.

It's not final yet — the judge granted Maple only a temporary injunction against the ruling — but unless the judge acts much more quickly than he did in this decision (he has been deliberating since a Nov. 8 hearing) the temporary injunction will allow Maple to compete in the tournament and make any further discussion meaningless.

But there is something much more important involved here than whether Maple was denied

TD Says

due process by the OHSAA, the basis of the temporary injunction.

When a person takes on a job in a school, whether it be as teacher, coach, administrator, or even maintenance worker, it is well to remember that his primary job is that of educator.

There is scarcely a person concerned with school who doesn't leave his mark in some way on the young people who pass his way — many are the lessons taken away from school by students which weren't learned from a lesson plan or out of a book. They come from personal experiences with and observations of their superiors and peers, from watching actions and reactions.

Such a lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.

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If the trial judge, perhaps erroneously, concludes that there is a jury issue and tries to frame an understandable jury instruction from the verbal orgy of nonsensical jargon which cascades from the majority's discussion of the spurious four-factor test so as to distinguish fact from opinion, his instruction will likewise probably be deemed nonsense by any reviewing court when measured by the standardless *Scott* case. In that event the appellate court should fashion a rule for jury instruction instead of the vacuous nonsense in the present opinion representing the views of a majority of four.

The standardless four-factor test for distinguishing fact from opinion, as applied here in *Scott*, makes every statement of fact a statement of opinion in every case and therefore not actionable. This is a deprivation of every libeled plaintiff's rights under both the Ohio Constitution and the United States Constitution[*] which provide as follows:

Section 16, Article I, of the Ohio Constitution:

"All courts shall be open, and every person, for an injury done him in his land, goods, person, or *reputation*, shall have remedy by due course of law, and shall have justice administered without denial or delay." (Emphasis added.)

Section 1 of the Fourteenth Amendment to the United States Constitution:

"* * * [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

If the majority desires to be absolutist (all statements of fact are opinions) with respect to the First Amendment freedom of the press, it should say so, as did the late Justice Hugo Black, instead of foisting upon the public several confusing theories, standards and analyses of legal justification and defense, all of which will obfuscate the law in this area.

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[*] The majority opinion says that "[m]isstatements and falsehoods are inevitable in any democratic scheme," and in the same paragraph indicates that such falsehoods are not redressable because of the "'chilling' effect" such redress would have on "the expression of unpopular statements." That is a strange convolution. Unpopular statements will be and should be protected until they become factual, legally defamatory statements.

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The OHSAA had suspended the team from the 1975 tournament after a hearing over a melee in a 1974 dual meet.

The Franklin County Commen Pleas Court judge ruled that the association had not followed due process in the hearing.

"Accordingly," he ruled, "the suspension from the State High School Wrestling Tournament of the Maple Heights team is unconstitutional and hereby enjoined."

Carlisle Dollings, attorney for the association, said he could not comment on the decision until he had examined it and talked to the association. He declined to discuss the possibility of an appeal.

Commissioner Harold Meyer of the governer body of state scholastic sports was attending a National High School Federation winter meeting in Orlando, Fla., and could not be reached.

Maple Heights won an unprecedented 10th big school state wrestling championship last March after the Mustangs and visiting Mentor were involved in a regular season brawl.

Four Mentor wrestlers were hospitalized after the disturbance during a dual match at Maple Heights.

Following the incident, the OHSAA conducted a hearing before its state board of control and suspended the team from the 1975 tournament.

Last winter they were faced with a difficult situation. Milkovich's ranting from the side of the mat and egging the crowd on against the meet official and the opposing team backfired during a meet with Greater Cleveland Conference rival Mentor, and resulted in first the Maple Heights team, then many of the partisan crowd attacking the Mentor squad in a brawl which sent four Mentor wrestlers to the hospital.

Naturally, when Mentor protested to the governing body of high school sports, the OHSAA, the two men were called on the carpet to account for the incident.

But they declined to walk into the hearing and face up to their responsibilities, as one would hope a coach of Milkovich's accomplishments and reputation would do, and one would certainly expect from a man with the responsible poisition of superintendant of schools.

Instead they chose to come to the hearing and misrepresent the things that happened to the OHSAA Board of Control, attempting not only to convince the board of their own innocence, but, incredibly, shift the blame of the affair to Mentor.

I was among the 2,000-plus witnesses of the meet at which the trouble broke out, and I also attended the hearing before the OHSAA, so I was in a unique position of being the only non-involved party to observe both the meet itself over the actual incident, the board then voted to suspend Maple from this year's tournament and to put Maple Heights, and both Milkovich and his son, Mike Jr. (the Maple Jaycee coach), on two-year probation.

But unfortunately, by the time the hearing before Judge Martin rolled around, Milkovich and Scott apparently had their version of the incident polished and reconstructed, and the judge apparently believed them.

"I can say that some of the stories told to the judge sounded pretty darned unfamiliar," said Dr. Harold Meyer, commissioner of the OHSAA, who attended the hearing. "It certainly sounded different from what they told us."

Nevertheless, the judge bought their story, and ruled in their favor.

Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

But they got away with it.

Is that the kind of lesson we want our young people learning from their high school administrators and coaches?

I think not.

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